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REPORTS OF CASES  
IN  
CRIMINAL LAW,

ARGUED AND DETERMINED

IN ALL THE COURTS IN ENGLAND AND IRELAND.

---

EDITED BY  
EDWARD WILLIAM COX,  
*SERJEANT-AT-LAW,*  
AND  
JOHN THOMPSON,  
*BARRISTER-AT-LAW.*

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VOL. XIV.  
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REPORTS  
OF  
**Criminal Law Cases.**

---

OXFORD CIRCUIT.

STAFFORD SPRING ASSIZES, 1877.

*Saturday, March 3.*

(Before Mr. Justice LINDLEY.)

REG. v. ALEXANDER BARNSLEY KNOCK. (a)

*Manslaughter—Self-defence—Fighting.*

*The right of self-defence does not justify counter-blows struck with  
a desire to fight.*

**PRISONER** was indicted for the manslaughter of Joseph Tipper.

*Godson* prosecuted.

*J. Underhill* defended the prisoner.

It was proved that the prisoner, being challenged, and attacked by the deceased, who had taken his coat off to fight, also took off his coat and blows of the fists were exchanged. After four or five rounds the deceased received from the prisoner a blow which killed him. The facts are more particularly stated in the summing up.

At the close of the case for the prosecution,

*Underhill* submitted that there was no evidence for the jury. The fatal blow must have been given accidentally in defence.

LINDLEY, J.—The case is perhaps on the border line. But, seeing that the men fought four or five rounds, there appears to have been what is called a “set-to.” I think, therefore, that under the circumstances, the facts should go to the jury.

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

REG.  
v.  
KNOCK.  
—  
1877.  
—  
*Manslaughter*  
—*Self-defence*  
—*Lawful*  
*excuse.*

Counsel for the prisoner having addressed the jury, LINDLEY, J., summed up.—The prisoner is charged with manslaughter, which means, causing the death of another without lawful excuse. If he did so, he is guilty; if he did not, he is not guilty. What, then, is lawful excuse? The difficulty is in drawing the distinction between self-defence and fighting. If two men fight, and one unfortunately kills another, then, they being engaged in an unlawful occupation or business, the killing of either by the other is manslaughter, even if it be by accident, and is a crime in point of law, although the crime varies in degree of gravity. But, on the other hand, if a man attacks me, I am entitled to defend myself, and the difficulty arises in drawing the line between mere self-defence and fighting. The test is this: a man defending himself does not want to fight, and defends himself solely to avoid fighting. Then, supposing a man attacks me and I defend myself, not intending or desiring to fight, but still fighting—in one sense—to defend myself, and I knock him down and thereby unintentionally kill him, that killing is accidental. It is for you to draw the line. The facts up to a certain point are not disputed. No doubt the deceased came to his death in the course of a struggle with the prisoner, and was knocked down by the prisoner, and by reason of being so knocked down died; *primâ facie*, that is unlawful killing. Next, let us consider whether the men were fighting in the sense I have defined, or whether the prisoner was desiring not to fight. The evidence clearly shows that it was the defendant who provoked this, and it was sworn that not only was a challenge to fight given—not only did they go out, but both had their jackets off. A fact in favour of the prisoner is that he was reluctant indoors to fight, and expressed the same reluctance out of doors. But they had four or five rounds. That is a circumstance which tends to show that these persons were really fighting as distinguished from mere resistance in self-defence. If you think the prisoner was doing what was lawful, simply defending himself, find him Not Guilty; but if he was fighting, then he was doing what was unlawful, and your verdict should be against him.

*Verdict, Not Guilty.*

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REG. v. WILLIAM BOND.

**P**RISONER was indicted for the manslaughter of John Giles.

*John Rose* prosecuted.

*J. Underhill* defended.

The case resembled the previous one, and the learned Judge



told the jury: "If you think the death was caused in legitimate self-defence as distinguished from a fight, as I have already explained to you, acquit the prisoner; but if you find that he was engaged in a fight he is guilty."

*Verdict, Not Guilty.*

REG.  
v.  
BOND.  
—  
1877.

*Manslaughter*  
—*Self-defence*  
—*Lawful*  
*excuse.*

## OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES, 1877.

*Thursday, July 12.*

(Before Mr. Justice LOPES.)

REG. v. JONES and HAYES. (a)

34 & 35 Vict. c. 112, s. 19—*Larceny—Evidence of previous acts of theft within six months—Subject of another indictment.*

*Upon the trial of an indictment for larceny and receiving certain stolen goods, evidence may be given under 34 & 35 Vict. c. 112, s. 19, that there was found in the possession of the prisoner other property stolen within the preceding period of twelve months, although such other property is the subject of another indictment against him, to be subsequently tried at the same assizes.*

**P**RISONERS were indicted for stealing and receiving, knowing to have been stolen, a quantity of brass.

*J. Underhill* and *Owen*, for the prosecutors, proposed to give evidence under 34 & 35 Vict. c. 112, s. 19, of other property found in the possession of the prisoners, and alleged to have been stolen within the six months preceding the date of the commission of the offence charged. This other property was the subject of a second and similar indictment found against the prisoners and about to be tried at the same assizes.

*Powell*, Q.C. for the prisoners.—The evidence is inadmissible. The prosecution seek to prove the second indictment on the trial

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

REG.  
v.  
JONES AND  
HAYES.

1877.

*Evidence—  
Other larcenies  
within six  
months.*

of the first, and the effect is to prejudice the prisoners in one or other of the trials.

*Underhill.*—The Act does not exclude evidence on any such ground.

LOPES, J.—My opinion is that the evidence is admissible; the statute contains no limitation of the kind suggested.

## OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES, 1877.

*Saturday, July 14.*

(Before Mr. Justice LOPES.)

REG. v. THOMAS DILLON. (a)

*Perjury—Evidence—Practice.*

*When perjury is alleged as having been committed before justices at petty sessions on the hearing of a charge contained in a written information, that information must be produced, or its loss or destruction proved before secondary evidence of its contents can be given at the trial of an indictment for the perjury.*

PRISONER was indicted for perjury committed before justices in petty sessions, on the hearing of a charge of drunkenness preferred against one John Dillon.

*H. D. Greene* prosecuted.

The Clerk to the Justices, being called as a witness, stated that an information in writing had been laid before them and a summons issued thereon against John Dillon, but he, the Clerk, produced neither the information nor the copy of the summons.

LOPES, J., said that as the charge upon the hearing of which perjury was alleged to have been committed was in writing, the document must be produced, or evidence given of its destruction or loss before secondary evidence of the contents could be admitted.

Counsel for the prosecution submitted that as the charge was

(a) Reported by JOHN ROSE, Esq., Barrister-at-law.

orally made against the defendant before the justices, in the hearing of the witness, the oral evidence of the nature of the charge was sufficient.

The learned Judge said that the point had frequently arisen, and he was clearly of opinion that the written information ought to be produced.

This information not forthcoming, an acquittal was directed.

REG.  
v.  
DILLON.

1877.

Perjury—  
Evidence.

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## OXFORD CIRCUIT.

GLOUCESTER SUMMER ASSIZES, 1876.

*Tuesday, August 7.*

(Before Mr. Justice BRETT.)

REG. v. JOSHUA MATTHEWS and TIMOTHY TWIGG. (a)

24 & 25 Vict. c. 97, s. 28—*Obstruction to air-way in mine—  
Malicious damages.*

*The provisions of 24 & 25 Vict. c. 97, ss. 28, 29, which enact that "whosoever shall unlawfully and maliciously" do certain acts therein specified "with intent" to damage or obstruct a mine, or the working or apparatus of a mine, shall be guilty of felony, do not render a person criminally liable for acts causing such damage, but done in bonâ-fide exercise of a supposed right, and without a wicked mind.*

**I**NDICTMENT framed on 24 & 25 Vict. c. 97, ss. 28 and 29, charged in the 1st count that the prisoners feloniously, unlawfully, and maliciously did fill up a certain airway of a certain mine the property of one George Matthews, with intent in so doing to damage the said mine.

2nd count charged the act as done with intent to injure the workings.

3rd count, that the prisoners did obstruct the airway with intent to damage it.

4th count, that they did obstruct with intent to hinder the workings.

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

REG.  
v.  
MATTHEWS  
AND TWIGG.

1877.

*Malicious  
injury—Mine.*

5th, 6th, 7th, 8th counts varied the above charges by describing the airway as a pit.

9th count, that the prisoners feloniously, unlawfully, and maliciously did break and unfasten certain work, to wit, a certain fence appertaining to a certain mine.

*Alfred T. Lawrence* prosecuted.

*Geo. Browne* and *Boddom* defended the prisoners.

From the opening speech for the prosecution it appeared that in 1865 the prosecutor obtained from the Crown a "gale" within the Hundred of St. Briavels, in the Forest of Dean, containing the "Invention" pit.

One Elton obtained a neighbouring mine.

In 1873 the prosecutor entered into an agreement with the prisoner Matthews, by which the latter was to work the gale and ultimately divide the profits.

The working began and continued until 1874.

In April 1874 the prisoner Matthews bought Elton's property.

From 1874 to 1875 the working ceased.

In June 1875 the prosecutor began to work the "Invention" pit, so as to connect his workings with an old pit in the neighbouring ground aforesaid.

In May 1876 he heard from the prisoner Matthews that unless he, the prosecutor, bought the mine which had belonged to Elton, he the prisoner would stop up an air shaft on it.

The prosecutor went on working and did not buy the property.

By Rule 1 of those made by the Commissioners for the Forest of Dean, "All persons now or at any time hereafter holding one or more gale or gales of any mine or mines of coal within the Hundred of St. Briavels shall be entitled to the free and unrestricted use and enjoyment of all the levels, draughts, drains, cuts out, and watercourses, pits, shafts, and pit heads belonging or appertaining to the gale or gales so holden, with liberty to dig, sink, work, and drive, make and use, such levels, &c.

On the 1st day of June, 1876, the prisoner Matthews and the prisoner Twigg, his workman, acting under his directions, stopped up the airway.

On the 13th day of July, 1876, the prosecutor's solicitors wrote to the prisoner Matthews, "We have been consulted on the subject of your having stopped up the pit in your land, part and parcel of the 'Invention' Colliery, whereby you have stopped up the airway of the other pit being worked by Mr. Matthews, belonging to the same work; by which act you and those who assist you have rendered yourselves liable to severe punishment, and unless you remove the obstruction within forty-eight hours from the delivery of this letter to you, application will be made to the justices at Littledean on Monday next for a warrant against all parties concerned in stopping up the airway." The prisoners disregarded the letter and did not remove the obstruction; whereupon the prosecution was instituted.

BRETT J., to the counsel for the prosecution, at the end of the

opening speech.—There is no case against the prisoner Twigg. Let him stand aside. You say the prisoner Matthews has committed a felony. When?

*Lawrence.*—When he stopped up the airway.

*BRETT, J.*—Then the letter of the solicitor either amounts to an attempt to compound a felony or treats the act of the prisoner as done in the exercise of an alleged right. But the act must be done maliciously, wickedly. I am perfectly clear that the prisoner is not within the statute, if he did the act in *bonâ fide* exercise of an alleged right.

*Lawrence.*—Where the act is wilfully done malice is presumed. As in cases of arson; even if a man by wilfully setting fire to his own house, burns also the house of one of his neighbours, it will be felony, see *R. v. Probert* (2 East, P. C. 1030, 1031), *R. v. Isaac* (*Ib.*, 1031); for the law in such a case implies malice, particularly if the party's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighbourhood; and generally, if the act be proved to have been done wilfully, it may be inferred to have been done maliciously unless the contrary be proved: (*Bromage v. Prosser*, 4 B. & C. 247, 255.) The absence of malice or spite to the owner is no answer to the charge: (Archbold's Cr. Pl. & Evid. 18th edit. p. 537.) [*BRETT, J.*—If, of course, you were able to prove that he intended to spite George Matthews, the case would be different.] He disregarded the notice.

*BRETT, J.*—The case has been opened with perfect clearness, and I am of opinion that if every fact stated were proved there would be no case to go to the jury; because I think that the act charged must be done not only wilfully, but maliciously, that is to say, with a wicked mind, and if it is done under a *bonâ fide* claim of right it is not done maliciously according to our criminal law. The evidence to be adduced shows that the prisoner did the act after notice and openly, and it is proposterous to say that he did it otherwise than under a *bonâ fide* claim of right. Whether he had a right or not must be tried in a civil court. And indeed it is evident from the letter that the prosecutor considered that the prisoner was acting under such *bonâ fide* claim of right. Both prisoners must be discharged.

*Verdict of Not Guilty entered.*

REG.  
v.  
MATTHEWS  
AND TWIGG.

1877.

Malicious  
injury—*Mine.*

## OXFORD CIRCUIT.

STAFFORD WINTER ASSIZE, 1877.

*Thursday, Nov. 29.*

(Before Mr. Justice MELLOR.)

REG. v. DICKEN. (a)

*Rape—Child between ages of twelve and thirteen—38 & 39 Vict. c. 94, s. 4.**An indictment for the felony of rape still lies against one who ravishes a female between the age of twelve and thirteen, notwithstanding the provisions of the 38 & 39 Vict. c. 94, s. 4, which enact that whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve, and under the age of thirteen, years, whether with or without her consent, shall be guilty of a misdemeanor.*

**P**RISONER was indicted for a rape on Rose Bickerton. Evidence was given to show that the prisoner had violated the prosecutrix without her consent. She was a girl above the age of twelve and under the age of thirteen years at the time the offence was committed.

*C. J. Darling*, for the prisoner, argued that the prisoner could not be convicted of felony. He was charged with rape. That offence consisted in his unlawfully and carnally knowing the girl against her will—*i.e.*, without her consent. But such an offence was now defined in 38 & 39 Vict. c. 94, s. 4, and thereby declared to be a misdemeanour. Consequently, with respect to girls between the age of twelve and thirteen the earlier statutes making that offence a felony were repealed.

MELLOR, J.—The prisoner is indicted for rape under the general law. The prosecutrix happens to be above the age of twelve and under the age of thirteen years, and that circumstance is relied on for the defence. The carnal abuse of children having excited the attention of the Legislature, they have been specially protected by Acts of Parliament. 24 & 25 Vict. c. 100, s. 51, enacted that, “Whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years, and

(a) Reported *ex rel.* by NIGEL W. NEVILLE, Esq., Barrister-at-Law.

under the age of twelve years, shall be guilty of a misdemeanour." Under this provision an offender was punishable whether the girl did or did not consent to his act. In 1875 it was thought desirable that further protection should be given to young girls, and the limit of ten years was extended, by 38 & 39 Vict. c. 94, s. 4, declaring that "Whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years, and under the age of thirteen, whether with or without her consent, shall be guilty of a misdemeanour." *Ex abundanti cautela* the words "whether with or without her consent" were inserted in the later enactment; but, save in respect of the alteration in the age of the girl, the law remained exactly as it was previously—that is to say, if she consented, the prisoner might be convicted of the statutory misdemeanour; if she did not, *à fortiori* he might be so. But if she did not consent, his offence would amount also to the higher crime—the felony—of rape, and he might be indicted and tried for it quite irrespective of the modern statutes throwing special protection around children. The present indictment is for rape, and therefore, if the girl consented to the carnal knowledge, the act was not done "against her will," and the crime is not made out. It would be preposterous to suppose that Parliament intended to repeal the law of rape as to girls of the very age during which extra statutory protection is cast over them, and I am clearly of opinion that no such repeal has been effected.

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DICKEN.

1877.

Rape—38 &  
39 Vict. c. 94,  
s. 4.

*Verdict, Guilty ; sentence, ten years penal servitude.*

By a note to 38 & 39 Vict. c. 94, s. 3, in his Digest of the Criminal Law, p. 178, Sir James F. Stephen writes of the phrase "whether with or without her consent:" "These words are obviously a mistake. In the preceding section (where they do not appear) they would have been superfluous, but harmless. In this section they are mischievous; for if taken literally, they make it impossible to commit a rape upon a girl between twelve and thirteen, as they provide that carnally to know a girl between twelve and thirteen, without her consent, is a misdemeanour. The words ought either to be omitted altogether, or else changed into 'even with her consent.' Probably the Court would so construe them, for it is impossible to suppose that Parliament can have intended the monstrous consequence pointed out above."

## COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Dec. 1, 3, and 4, 1877.

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

CLARK v. MOLYNEUX. (a)

*Libel and slander—Privilege—Honest belief in truth of defamatory statement—Immateriality of reasonableness of belief.*

*Defamatory statements published on a privileged occasion, in the honest belief that they are true, are privileged whether such belief is reasonable or not.*

*In an action for libel and slander the judge ruled that the occasions of publication were privileged, and left it to the jury whether the defendant honestly and reasonably believed his statements to be true. The jury found for the plaintiff.*

*Held (reversing the judgment of the Queen's Bench Division), that this was a misdirection, and there must be a new trial, because it had not been explained to the jury that the burden of proof was on the plaintiff, and because the reasonableness of the defendant's belief was immaterial.*

**A**PPEAL from the judgment of the Queen's Bench Division. The action was brought by the plaintiff, who was a clergyman of the Church of England, to recover damages against the defendant, who was also a clergyman of the Church of England, for libel and slander. The following letter was the libel complained of:

The facts as I have them are these. If you had been at home I should at once have communicated them to you. Mr. N. Clark was a candidate for the vicarage of All Saints. Mr. H. Pratt, being much interested in this, was anxious to learn particulars about him; and knowing that he had been curate of Horringer in the neighbourhood of Bury, and near to Mr. Bevan's place, he requested Mr. Bevan to make some inquiry about him. The result of this was, among other things, that Mr. James Oakes assured him that he had seen a letter containing the matter reported to you by Mr. Canham. Mr. Gascoigne Bevan was with his father in Mr. Hervey Oakes' dining room when Mr. James Oakes gave the information. At the time, Hervey Oakes stated that Mr. N. Clark had been expelled from the army for cheating at cards, had led a profligate life at Cambridge, &c. Mr. Gascoigne Bevan is quite willing to tell you all he knows, and to write for further information to Mr. Oakes.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.



This letter was written by the defendant to the Rev. H. L. Maud, the vicar of the parish where the defendant had been curate, in answer to a letter of inquiry. "The matter reported by Mr. Canham" referred to certain alleged immoral conduct on the part of the plaintiff while curate of Horringer. The statements contained in the letter had in fact been communicated to the defendant, with this difference, that the communication made to the defendant was that the plaintiff had been obliged to leave the army in consequence of trouble at cards, and had led an irregular life at Cambridge. The slander complained of consisted in verbal repetitions of some of the matters referred to in the letters to several other clergymen, amongst others to the Rev. Mr. Green, the defendant's curate.

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Libel—Priv-  
ilege—Honest  
belief.

The action was tried at the Suffolk Summer Assizes for 1876, at Bury, before Huddleston, B., who held that all the occasions of publication were privileged, but left the question of malice to the jury, with the direction which is set out in the early part of the judgment of Bramwell, L.J. The jury found a verdict for the plaintiff for 200*l.* damages. A rule for a new trial on the ground of misdirection was discharged by Cockburn, C.J. and Mellor, J. (36 L. T. Rep. N. S. 466), and the defendant appealed.

*Willis*, Q.C. and *C. H. Anderson* for the defendant.—The summing up of the learned judge at the trial was incorrect, and therefore the verdict cannot be upheld. The jury ought to have been told that however unreasonable may have been the grounds on which the defendant formed his opinion, if he really believed what he stated to be true, and acted with honesty of purpose, they must find a verdict in his favour. *Pitt v. Donovan* (1 M. & S. 639) is a distinct authority for the proposition that, if the occasion of publication is privileged, *bonâ fide* belief and honesty of purpose will exempt the person who makes the statements from liability, and reasonableness of belief is not the correct test to apply. The occasions of publication in the present case were all clearly privileged, and that being so, the burden of proof was on the plaintiff; it was for him to establish that there was malice, and unless he could show this affirmatively there was no case to go to the jury: (*Wright v. Woodgate*, 2 C. M. & R. 573.) The discrepancy between the words of the alleged libel and the statement which was made to the defendant is too slight to amount to any evidence of malice.

*Philbrick*, Q.C. and *Cuffe* for the plaintiff.—Assuming that honesty of purpose is sufficient to give the privilege, still other matters must be looked at to see whether such honesty of purpose really exists or not, and recklessness or want of reasonableness, or want of reasonable care, would be strong evidence to show that it did not exist. The judgments in *Pitt v. Donovan* (*ubi sup.*) support this proposition. The summing up was substantially correct; for, in considering what the defendant's state of mind was, he ought to be judged by the standard of a reasonable man. The following cases were also cited in the argument:

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*Bromage v. Prosser* (4 B. & C. 247); *Spill v. Maule* (L. Rep. 4 Ex. 232; 38 L. J. 138, Ex.; 20 L. T. Rep. N. S. 675); *Laughton v. The Bishop of Sodor and Man* (L. Rep. 4 P. C. 495; 42 L. J. 11, P. C.; 28 L. T. Rep. N. S. 377); *Ohild v. Affleck* (9 B. & C. 403); *Lister v. Perryman* (L. Rep. 4 H. of L. 521; 39 L. J. 177, Ex.; 23 L. T. Rep. N. S. 269); *Fryer v. Kinnersley* (15 C. B. N. S. 422; 33 L. J. 96, C. P.; 9 L. T. Rep. N. S. 415); *Whiteley v. Adams* (15 C. B. N. S. 392; 33 L. J. 89, C. P.; 9 L. T. Rep. N. S. 483); *Gilpin v. Fowler* (9 Ex. 615; 23 L. J. 152, Ex).

[BRAMWELL, L.J. referred to *Coxhead v. Richards*, 2 C. B. 569; 15 L. J. 278, C. P.]

*Willis*, Q.C. in reply.—Judgment ought to be entered for the defendant without sending down the case for a new trial: (Order XL., r. 10; Order LVIII., r. 5.) [BRAMWELL, L.J. referred to *Milissich v. Lloyds*, 36 L. T. Rep. N. S. 423.] There is no evidence of malice here, and therefore the defendant is entitled to judgment.

BRAMWELL, L.J.—I think the appeal must be allowed, but I am glad to say that I am satisfied I do not differ from the view of the law which was adopted by the Lord Chief Justice and Mellor, J., in the court below. I am satisfied that the difference of opinion is the result of a different appreciation of the summing up of the learned judge at the trial. I have asked Mr. Willis during the course of the argument whether he dissented from the law as laid down by the Divisional Court, and he said that he did not. While differing from the learned judges in the court below as to the conclusion at which we ought to arrive in this case, I agree that in dealing with the summing up of a judge on the trial of an action, not for the sake of the judge, but in the interest of the parties, we must not criticise it too rigorously. I think we ought to take a liberal view, and look at the whole of the summing up to see whether it is a fair guide to the jury, and unless we are satisfied that the jury have gone wrong, and were influenced by the incorrectness of the summing up so as to affect their verdict, we ought not to set aside the verdict on the ground of misdirection. But in the present case I think the question was inaccurately left to the jury. No doubt many things were said in the course of the summing up which would have been quite proper as a direction to the jury if properly applied to the facts of the case, but we must look at the whole of the summing up to see what the effect of it was. The question was left to the jury in these words, "I say the occasions were privileged. Did the defendant write the letter of the 2nd May, and make the statements with regard to the plaintiff *bonâ fide*, and in the honest belief that what he wrote and said with reference to the plaintiff was true, or was he actuated by feelings of malice?" Now, with the greatest respect for the learned judge, I think that is a misdirection, and that the proper direction would be that the occasions on which the defendant wrote and spoke the words complained of were privileged, and that unless the jury were

satisfied that the defendant wrote or spoke with malice (giving a proper explanation of the meaning of malice), the verdict ought to be for the defendant. But here the question was left to the jury as if the burden of proof were on the defendant. There is also another objection to the way in which the question was left to the jury; it was put in such a way that the jury would think that they must find one of two things affirmatively, that is, if they could not find one they must find the other; if that is all that the jury were told I think it is not enough. The learned judge shows what he means in the last sentence before he proceeds to deal with the question of damages, which is as follows: "Which" (that is honest belief) "means that he had good ground for believing them to be true, I mean to say, did not pigheadedly, pertinaciously, and obstinately perhaps, persuade himself of the matter, for which he had no reasonable grounds, and of which you twelve gentlemen would say that they were perfectly unjustified." This seems, therefore, to be the result of the way in which the case was put to the jury; it was left to them to say whether the letter was written and the words spoken by the defendant *bonâ fide* and in the honest belief that the statements which he made were true; and the learned judge then goes on to explain that honest belief means belief based on reasonable grounds. The jury must have had in their minds the idea that they had to consider whether the belief of the defendant was both *bonâ fide* and reasonable. I think that this is a misdirection, and the verdict cannot stand. I am confirmed in this view because I also think that the verdict was against evidence. It is difficult to say that there was no evidence, and I think perhaps it was better to take the opinion of the jury; not on the ground that there was any evidence of rashness or recklessness on the part of the defendant in making the statements without being satisfied of their truth (although I agree with the Lord Chief Justice that there were many things which the defendant might have done which would have been preferable to what he did); but my doubt arises partly from the number of communications which the defendant made, and partly from the fact that the letter written by the defendant contained somewhat stronger expressions than those which had been used in the communication made to him. Instead of that the plaintiff had had to leave the army for trouble at cards, the defendant wrote that he had been expelled from the army for cheating at cards, and, instead of that he had led an irregular life at Cambridge, that he had led a profligate life. It is possible that, if these facts were laid before the jury with a proper direction, they might find that the defendant was careless as to what injury he might do the characters of others, and because he wished to be thought a zealous clergyman, or from some other similar motive, made these statements. It is barely possible that the jury might find this, and though I have some misgiving, I hesitate to say that there was no evidence. We must bear in

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belief.*

mind that the jury have not to ascertain what motive actuated the defendant, but if it was any wrong motive they may find a verdict for the plaintiff. I have another difficulty, which is this. I am by no means sure that the communication which was made by the defendant to Mr. Green was privileged. I have some misgivings, but I doubt whether, where a man will assist himself by taking the advice of another, he should not be careful in doing so to act in such a way as not to cause injury to other people. But I have the strongest feeling that the verdict was against evidence, and I think I am bound to say so, because the case may go further on appeal. If there was more than a mere scintilla of evidence I think the jury ought to have disregarded it and found for the defendant. I should maintain this appeal on the two grounds, that there was misdirection and that the verdict was against evidence; it is not necessary to decide whether there was no evidence. I do not think that Order XL., r. 10, is applicable to the present case; I think it is only applicable to cases where we know all the truth which could be told, and that this case does not come within it. But on the two grounds, that there was misdirection, and that the verdict was against evidence, I think the appeal must be allowed, and there must be a new trial.

BRETT, L.J.—I am of the same opinion. I think there was misdirection, and that the verdict was against the weight of evidence, and that there was no evidence to go to the jury on behalf of the plaintiff. As to the question of misdirection I agree with Bramwell, L.J., and I do not think that we really differ in opinion from the judges of the Queen's Bench Division on any question of law. I think, however, that the direction of the learned judge at the trial must have materially misled the jury. I think I ought to lay down what I consider to be the proper direction to be given to the jury in such a case, before criticising the summing up of Huddleston, B. at the trial. I am of opinion that when a defamatory writing or defamatory words have been published, and the judge has held that the publication was on a privileged occasion, when he says there is privilege it must be for some reason, and the defendant is only entitled to the protection afforded by the privilege if he uses the occasion for the reason for which the privilege is given, but not if he uses it otherwise. If he does not use the occasion for the reason for which the privilege was given, but uses it for some indirect and wrong reason or motive of his own, then there is malice. There are certain tests as to when malice exists. It is not malice as in pleading that is to be understood by the expression in cases of this kind, but it means a wrong feeling in the defendant's mind. There are two tests to show whether there is malice when defamatory statements have been published on a privileged occasion. If it is proved that the defendant stated what he knew at the time to be false, then everybody assumes the existence of malice, and that he acted from a wrong motive, and no one inquires what

the motive was. But supposing it is not proved that the defendant knew at the time that what he stated was false, still he may not be acting for the reason for which the privilege was given; and if from anger or any wrong motive he states as true what he does not know to be true, the jury may infer that he did not make the statement for the true reason, but that he made it from an indirect motive, and if he has acted for any other reason than that for which the privilege is given he would not be protected. These two tests have been used in the Court of Common Pleas by Bovill, C.J. and Willes, J., and I think their view is right. If it is right, then I think that Huddleston, B., taking the whole of his summing up together, did not follow it, or so expressed himself that the jury were misled in this, that they were induced to think that the burden of proof was on the defendant, whereas, when it has been pronounced by the judge that the publication took place on a privileged occasion, the whole burden is on the plaintiff. The next error was in reading a passage from the judgment in *Bromage v. Prosser* (4 B. & C. 247), which does not give a definition of malice in respect of what is or is not malicious in fact, but deals rather with the meaning of the word malice in pleadings and indictments, in which "maliciously" is a technical word, and is the same as "wilfully." That is what Bayley, J. was there pointing out; but the real meaning of malice, which he applied later in the same judgment, is a wrong feeling in a man's mind. The passage from the summing up which has been read by Bramwell, L.J., and which is substantially a recapitulation of the whole summing up, must have led the jury to suppose that, although they might be of opinion that the defendant did believe the statements he made to be true, that would not be sufficient unless he had a reasonable ground for so believing. I apprehend that if he did believe the statements to be true, and if want of belief in their truth was the only thing tending to show malice alleged against him, the only question would be, not, would a reasonable man believe the statements to be true, but, did the defendant believe them? The test of stupidity and obstinacy is not a fair one, for stupidity or obstinacy would only be evidence tending to show that the belief was not genuine. I think that the direction was one which would mislead the jury, and was wrong. I have formed a strong opinion that all the occasions were privileged. The only one which can be questioned is that of the communication to Mr. Green; but I have a strong opinion that, where a relation so intimate, socially and professionally, as that between rector and curate exists, and they are consulting together as to ecclesiastical matters, and as to the behaviour of a clergyman with whom they were brought into communication in the course of their duties, the occasion is privileged, and Mr. Green, who was called as a witness for the plaintiff, said that the defendant did consult him for advice. The plaintiff is bound by his own witness, and there was no question for the jury but as a matter of law the privilege existed. I think that all the occasions

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were privileged. Then was there any evidence for the jury, if the right question had been left to them? Taking the privilege to exist the burden of proof was on the plaintiff, and the slight discrepancies which existed between the statements made to the defendant, and those made by him were far too slight to justify the judge in asking the jury whether the defendant was influenced by an indirect motive. I think there was no evidence to go to the jury, and therefore, if on a new trial the facts are not altered, the duty of the judge will be to direct a verdict for the defendant. If there was any evidence I am clearly of opinion that the verdict was unreasonable and against evidence and ought to be set aside. Assuming that there was no evidence, we cannot apply Order XL., r. 10, and enter the verdict for the defendant, for it does not follow that there may not be some evidence which may be given to make out a case for the plaintiff; but on the other two grounds I think the judgment should be reversed.

COTTON, L.J.—I am also of opinion that the judge left the case to the jury so as to mislead them as to what the true question was. When the judge had once ruled that the occasions of the publication were privileged, the only question was, did the defendant act from a sense of duty or from some other motive? and the burden of proof was on the plaintiff; the presumption is in favour of the defendant, and against the existence of malice. The plaintiff in this case had to prove actual malice, that is, that the defendant was acting not from a sense of duty but from some indirect motive, and the question is, was there "*mala mens*," which actuated the defendant? We must look at all the circumstances, and I agree that we must apply reason to the case as reasonable men do and must. The question is, what was the state of mind of the defendant? and want of reasoning powers or stupidity would not be malice. The judge must say whether the privilege exists, and when he has once laid down that the circumstances are such as to show privilege, the defendant can only be deprived of the privilege by the plaintiff showing that the defendant acted not from a sense of duty but from some other motive. If the defendant knew that there was no foundation for these statements, that would show malice; but the state of his mind was to be tried, and the question of honest belief, in the sense in which the learned judge described it, is not the question. There is another fault in the summing up. The burden of proof is on the plaintiff, and it is for the plaintiff to make out and satisfy the jury that the defendant was acting from some other motive than a sense of duty. As to the privilege, my only doubt has been about the communication made by the defendant to Mr. Green, and I think there was privilege on that occasion. It might be for the jury to say under what circumstances the communication took place, if there were a conflict of evidence; but here the plaintiff's own witness states the circumstances, and I should say the judge was right in saying that the statement was privileged. It was made

by a rector to his curate, and with reference to a matter affecting two parishes, and which might affect Mr. Green himself. I think, therefore, the judge was right in holding it to be privileged. The other questions are whether there was any evidence, and what ought to be done. In my opinion there was not such evidence here (as is said in *Somerville v. Hawkins*, 10 C. B., at page 590) as to "raise a probability of malice, and be more consistent with its existence than with its non-existence." There was no evidence of any indirect motive which induced the defendant to act as he did. There are no facts or letters to show that he was not acting in the performance of his duty. I think the discrepancies between the statements made to the defendant and those made by him are fairly attributable to forgetfulness in the absence of other evidence. As to the number of persons to whom the communications were made, the occasions were all privileged; and that explains the circumstance of the number of communications, which does not, in my opinion, afford any evidence of malice. I agree that it would not be right to enter the verdict for the defendant, and therefore there ought to be a new trial.

*Judgment reversed, and a new trial ordered.*

Solicitors for plaintiff, *John Grout*.

Solicitors for defendant, *Few and Co.*

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lege—Honest  
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## COURT OF CRIMINAL APPEAL.

*Saturday, Jan. 19, 1878.*

(Before COCKBURN, C.J., CLEASBY, B., LINDLEY, MANISTY, and  
HAWKINS, JJ.)

REG. v. PAUL READ. (a)

*Embezzlement—Wild rabbits—Taking, killing, and removing—  
One continuous action.*

*The prisoner was employed to look after a wood in which the game  
and rabbits and right of sporting had been granted to his  
master by the owner. He was not at liberty to kill rabbits for  
his own use, but he did take, kill, remove and sell eighteen*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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*rabbits in and from the wood, nevertheless. The taking, killing, removing and selling were parts of one continuous action.*  
*Held, that the criminal offence (if any) was not embezzlement.*

CASE stated by the Vice-Chairman of the Berks Quarter Sessions for the opinion of this Court.

The prisoner was indicted at the Berks Epiphany Sessions, held the 31st day of December, 1877, for stealing eighteen rabbits, the property of Arthur Smith, his master.

The evidence showed that the prisoner was the gamekeeper of Smith, and was employed to look after a wood in which the game and rabbits, and right of sporting, had been granted to Smith by the owner.

The prisoner was not at liberty to kill or take rabbits in the wood for his own use.

He did take and kill and remove eighteen wild rabbits in and from the wood, and had bargained to sell them, when they were seized in the possession of the purchaser's agent; the capturing, killing, removing, and selling being parts of one continuous action.

Counsel for the defence required the Court to stop the case, because there was not any evidence to go to the jury; that the rabbits had never as subjects of larceny been in the possession of Smith; and that, therefore, the prisoner could not be guilty of stealing or embezzling them.

Counsel for the prosecution insisted that, when the rabbits were captured and killed by the prisoner, they were by that act reduced into the possession of his master, and became subjects of larceny or embezzlement.

*Reg. v. Townley*, L. Rep. 1 C. C. R. 315; 12 Cox C. C. 59; and *Reg. v. Callum*, L. Rep. 2 C. C. R. 28; 12 Cox C. C. 469, were cited.

The case was left to the jury, the Court telling them that the criminal offence of the prisoner (if any) was embezzlement and not larceny, and that if, in their opinion, the prisoner being the servant of Smith captured and killed the rabbits, although against the orders of his master, and they so came into the possession of the prisoner for or on behalf of his master, and the prisoner converted them to his own use, he was guilty of embezzlement.

The jury found the prisoner guilty of embezzlement, and he was sentenced to four months' imprisonment with hard labour.

The Court reserved for the opinion of the Superior Court, which they now request, the question, whether the prisoner, by capturing and killing the rabbits against his master's orders, did so bring them into the possession of his master that he could, by appropriating them to himself, be guilty of embezzling them.

The Court respited the execution of the judgment on the conviction until such question has been decided.

GEORGE CHARLES CHERRY,  
Vice-Chairman of Berks Quarter Sessions.



*Howard Smith* for the prisoner.—It is submitted that the prisoner was not guilty of embezzlement. The case finds that the capturing, killing, removing, and selling the rabbits were parts of one continuous action, and therefore the rabbits, according to *Reg. v. Townley*, were not the subject of larceny. In that case Bovill, C.J., said: "Now, the first question is as to the nature of the property in these rabbits. In animals *feræ naturæ* there is no absolute property: there is only a special or qualified right of property—a right *ratione soli* to take and kill them. When killed upon the soil they become the absolute property of the owner of the soil. This was decided in the case of rabbits by the House of Lords, in *Blades v. Higgs* (11 H. of L. Cas. 621; 34 L. J. 286, C. P.). And the same principle was applied in the case of grouse in *Lord Lonsdale v. Rigg* (1 H. & N. 928; 26 L. J. 196, Ex.). In this case therefore the rabbits being started and killed on land belonging to the Crown, might, if there were no other circumstance in the case, become the property of the Crown. But before there can be a conviction for larceny for taking anything not capable in its original state of being the subject of larceny—as for instance, things fixed to the soil—it is necessary that the act of taking away should not be one continuous act with the act of severance or other act by which the thing becomes a chattel, and so is brought within the law of larceny. This doctrine has been applied to stripping lead from the roof of a church, and in other cases of things affixed to the soil. And the present case must be governed by the same principle." As the rabbits in the present case were not the subject of larceny, so neither are they the subject of embezzlement. The 24 & 25 Vict. c. 96, sect. 68, enacts that whosoever, being a servant or being employed for the purpose or in the capacity of a servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person, &c., employed." The rabbits here were not delivered to, or received by, or taken into the possession of the prisoner for or in the name or on the account of his master, but on his own account and for his own gain. The case is similar to that of *Reg. v. Cullum*, where the captain of a barge used the barge for his own purposes contrary to his master's orders, and so earned money which was paid to him and appropriated to his own use; and this was held not to amount to embezzlement. Then again the rabbits were not "chattels" at the time of killing, which was done that the prisoner might get the property for himself. [MANISTY, J.—It is clear that a dead rabbit is a chattel, and belongs to somebody. HAWKINS, J.—But here the prisoner had the rabbits in his possession before he killed them, and the taking, killing, and removing them were all one

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continuous act.] That is so. When the rabbits were taken into the possession of the prisoner they were not chattels. Suppose a wild rabbit ran into the hall of a house, and the servant caught and killed it then and there; would he be guilty either of larceny or embezzlement? It is submitted that he would not.

*H. D. Greene* for the prosecution.—The prisoner was properly convicted of embezzlement. That a chattel was received into the possession of the prisoner is clear from *Blades v. Higgs* (11 H. of L. Cas. 621). In that case Lord Chelmsford said: "With respect to wild and unreclaimed animals, there can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain that, when killed or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property absolutely when they are killed, and in a qualified manner when they are reclaimed. Does the unauthorised act of a trespasser, by the very act of killing them, convert them at once to the use of the owner of the land? If the appellant is right in saying that the owner of the land has no property in game unless it is killed by him or by his authority, it will necessarily follow that a poacher reducing the game into possession, and thereby as possessor, though a wrong-doer, having a right to it against all the world but the true owner, there being no owner to challenge his possession, might maintain an action against the owner of the land for taking the game from him, even upon the land itself, when it was killed. It is much more reasonable to hold that the trespasser, having no right at all to kill the game, can give himself no property in it by his wrongful act, and that as game killed or reduced into possession is the subject of property, and must belong to somebody, there can be no other owner of it under these circumstances but the person on whose ground it is taken or killed." It is clear dead rabbits are the property of someone, and, according to *Blades v. Higgs*, of the owner of the land on which they are killed. [COCKBURN, C.J.—Suppose the rabbits are taken while asleep? MANISTY, C.J.—Or caught in a trap and taken away alive?] In this case they were killed on the land. The master has a constructive possession by the prisoner, his servant, killing them in the wood. [COCKBURN, C.J.—By the statute it must appear that the prisoner took the rabbits for or on account of his master. That is contrary to the fact, for the prisoner took the rabbits for himself. He intended to rob his master, and took the rabbits for himself.] On that view the prisoner might be convicted for larceny. [COCKBURN, C.J.—But he was not, and the question reserved is as to embezzlement.] When a butler steals his master's plate or wine, in point of law they are in the master's possession at the time. Here the rabbits, when killed, became the master's property, but were not at the time in his possession. In *Reg. v. Oullum* Blackburn, J. said: "Without criticising the words of the Act, 24 & 25 Vict. c. 96, s. 68, let us look at the object of passing it. The common law requires,

for the offence of larceny, not only *animus furandi*, but that there should be a taking, and it was held, on the narrow distinctions of the common law, that when the property only became the master's by coming into the hands of his servants, and not otherwise, the servant could not be said to take his master's property, because it came into his hands at the moment it was so received. It was to meet this difficulty that the Legislature said, 'He who embezzles shall be guilty of stealing, although the property has not become the master's, except by the possession of the servant.' And in the original Act were the words 'by virtue of his employment,' which have been expressly omitted from the more recent statute. Yet still the essence of the matter is, that the servant shall be deemed to have stolen the master's property, if it be his master's property, although not received otherwise than in the prisoner's capacity of clerk or servant." Here the prisoner had his master's property when the rabbits had been killed by him. [HAWKINS, J.—In *Reg. v. Roe* (11 Cox C. C. 557), Willes, J. said, "By the decision in *Blades v. Higgs* it was never intended that poachers should be put on the same footing with felons."]

COCKBURN, C.J.—We are all agreed that the conviction must be quashed.

*Conviction quashed.*

Solicitors for the prosecution, *J. T. Dodd*, Reading.

Solicitors for the prisoner, *R. A. Ward*, Maidenhead.

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## COURT OF CRIMINAL APPEAL.

Saturday, Nov. 17, 1877.

(Before KELLY, C.B., FIELD, J., HUDDLESTON, B., LINDLEY, J., and  
MANISTY, J.)

REG. v. ROGERS. (a)

*Jurisdiction—Venue—Embezzlement—Receipt of money in one county—Fraudulent representation of non-receipt made by letter received in another county.*

*It was the prisoner's duty as a country traveller to collect moneys and remit them at once to his employers. On the 18th day of April he received money in county Y.; on the 19th and 20th he wrote to his employers from Y., not mentioning that he had received the money; on the 21st day of April he wrote to them again from Y., by that letter intending them to believe that he had not received the money. The letters were addressed to and received by his employers in county M., and posted in county Y. Held (Huddleston, B. dissentiente), that the prisoner might be tried in county M. for the offence of embezzling the money.*

CASE stated for the opinion of this Court by the Assistant Judge of the Middlesex Sessions.

At a General Sessions of the peace for the county of Middlesex held at the Guildhall, Westminster, on the 7th day of June, 1877, the prisoner was tried on an indictment which charged him with having, when he was employed in the capacity of clerk or servant to Middleton Chapman and another, embezzled the sum of 10*l.* 17*s.* 6*d.* received by him on their account.

The prisoner was employed by the prosecutors, who carry on business under the style of Chapman, Son, and Co., at Charterhouse-buildings, London, as their country traveller. It was part of his duty to collect outstanding accounts; and as to all moneys he might receive, to remit them "at once" to his employers in London either by post-office orders or bankers' drafts.

On the 12th day of April, 1877, when he was starting on his first journey, a "list," of which the following is a copy, was handed to him, and he was requested to collect the accounts therein specified:

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

List of accounts received from customers on account of Chapman, Son, and Co., for week ending April 14, 1877, by Mr. E. G. Rogers:

	£	s.	d.
(1.) James Wood and Co., York ... ..	2	7	6
(2.) T. and H. Chapman, York ... ..	11	8	6
(3.) Thomas Kidd, Hull ... ..	6	16	0
(4.) T. W. Carr, Scarborough ... ..	1	8	6

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At the foot of this list there was a printed note as follows:

All moneys received as above must be remitted to the firm at once, and this list returned with the balance in hand at the end of each week.

Mr. M. Chapman, one of the prosecutors, drew the prisoner's attention to this note, and desired him under no circumstances to mix up moneys collected from customers with his expenses. Ten pounds were then paid him in advance for his travelling expenses.

On Wednesday, the 18th day of April, the prisoner, being then at York, received there from Messrs. T. and H. Chapman 10*l.* 17*s.* 6*d.* cash in discharge of the account No. 2 in the above list. He never accounted to his masters for this money, nor informed them that he had received it; and under the present indictment he was charged with having embezzled it.

It appeared that on the same day that he was paid this account he received from the prosecutors a second sum of 10*l.* towards his travelling expenses, and a third sum of 10*l.* was remitted to him for these purposes on the 24th day of April. On the 19th and 20th days of April he was at Hull, and while there he wrote three letters to his employers, but he remitted no moneys, and in neither of these letters is there any reference to the account which had been paid to him by Messrs. Chapman, of York. On Saturday, the 21st day of April, the prisoner was at Doncaster, and there he wrote again to the prosecutors. All these letters were addressed to them at Charterhouse-buildings, in the county of Middlesex, and were there received by them through the post-office.

In his letter from Doncaster of the 21st day of April, after referring to Kidd's account (No. 3 in the above list), as to which he said Kidd had promised to remit the amount, the prisoner wrote as follows: "I have only *two other accounts* with which I have been furnished with statements to collect before I arrive at Scarborough, which, as I shall have to go through York, will attend to and remit you in due course."

The above list of accounts being the only statement that had been furnished to him, and the account due from Kidd having been specially mentioned in a former part of this letter, it is obvious that one of the only two other accounts, to which the prisoner here referred was T. and H. Chapman's account (No. 2), which in point of fact he had already received.

Other letters and telegrams passed between the prisoner and the prosecutors, to which it is unnecessary for the present purpose to advert.

On the 2nd day of May the prisoner was arrested at Newcastle. He was brought thence to London, and committed at Bow-street

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for trial upon the present charge at the Middlesex Sessions. When arrested he had only 4*l.* 6*s.* 7*d.* in money in his possession.

Upon the above facts it was contended, on behalf of the prisoner, that the indictment failed of proof; the embezzlement, if embezzlement there was, having been committed in the county of York, where the money was received and appropriated by him, and not in the county of Middlesex; it having been the prisoner's duty to account and remit the amount "at once."

On the other hand, the counsel for the Crown contended that the venue was well laid in Middlesex, inasmuch as the prisoner's letter of the 21st day of April amounted virtually to a denial in that county of the receipt of the money, that letter having been addressed by him to Charterhouse-buildings, London, and there received by his employers through the post-office.

Having doubts upon the question thus raised, I refused to direct an acquittal, and said I would reserve the question of venue for the Court of Appeal. I therefore left the question of embezzlement to the jury irrespective of venue; but with regard to the alleged denial in Middlesex, I requested them to say whether in their opinion the prisoner intended that the prosecutors should understand, from the aforesaid statements contained in his said letter of the 21st day of April, that he had not yet received the amount due from Chapmans of York, and had thus in effect rendered a wilfully false account.

The jury found the prisoner guilty, and answered these questions in the affirmative.

I postponed sentence pending the decision of this case.

The question reserved is whether, under the circumstances above disclosed, the venue was well laid in Middlesex. If the Court should be of opinion that it was, the conviction to stand; if of the contrary opinion, to be quashed.

I beg to refer to *Reg. v. Murdock* (2 Den. C. C. 298, 5 Cox C. C. 360), and to the observations thereupon of Alderson, B., in *Reg. v. Davison* (7 Cox C. C. 159.)

P. H. EDLIN.

No counsel appeared to argue on behalf of the prisoner.

*Besley* for the prosecution.—The venue was properly laid in the county of Middlesex. As soon as the prisoner received the money charged in the indictment to have been embezzled it became his masters' property, and it was his duty to have remitted it at once to the prosecutors. The letter of the 21st day of April, as found by the jury, conveyed the false representation that he had not received the money. This letter was addressed to and received by the prosecutors in Middlesex, and the prisoner's false statement therein was, when the letter arrived, a false representation made by the prisoner in Middlesex; that is an act done by him in Middlesex. In *Reg. v. Leech* (7 Cox C. C. 100) a letter containing a false pretence was received by the prosecutor through the post in the borough of C., but it was written and



posted out of the borough. In consequence of the letter the prosecutor sent through the post to the writer a post-office order for 2*l.*, which sum was received by the writer out of the borough; and it was held that the writer might be indicted for false pretences in C. In the present case there was no false representation to the prosecutors that the money had not been received until the receipt of the letter of the 21st day of April in London. The mere posting of the letter was not a false representation to them. The non-delivery of the money over to the master *per se* was not embezzlement. There was no complete embezzlement in Yorkshire. Up to the moment of the false representation made to the prosecutor in Middlesex by the letter of the 21st day of April there was no complete embezzlement. *Rex v. Taylor* (3 Bos. & Pul. 506; Rus. & Ry. 63); *Reg. v. Murdock* (2 Den. 298; 21 L. J. 22, M. C.; 5 Cox C. C. 360); *Rex v. Hobson* (Rus. & Ry. 56); *Rex v. Burdett* (4 B. & Ald. 95).

KELLY, C.B.—I am clearly of opinion that the conviction ought to be affirmed. The prisoner is charged with having, while he was employed in the capacity of clerk or servant to the prosecutors, embezzled the moneys of his employers. It was part of the prisoner's duty to collect outstanding accounts; and as to all moneys he might receive it was clearly his duty to remit them at once to his employers, from the place where he received them to his employers in the county of Middlesex. On the 18th day of April the prisoner received the money embezzled at York, but did not account to his employers for the money, nor inform them that he had received it. If the case had stopped there, and there had been no other evidence, or if it had merely appeared that he did not remit the money on the same or next day after he had received it, there would have been no evidence of the crime of embezzlement in Middlesex. But on the 18th day of April, the day of the receipt (and it does not appear in what form he received the money, or at what time of the day) he received 10*l.* from his employers for travelling expenses. Then on the 19th and 20th days of April he was at Hull, and while there he wrote two letters to his employers; but he remitted no moneys, and did not refer to the receipt of this money in either of the letters. It may well be that he had no time or means for remitting the money which he had received on the 18th, but it was clearly his duty to have remitted it within a reasonable time after his arrival at Hull. On the 21st day of April the prisoner wrote again from Doncaster to his employers in London; and although in that letter he does not expressly state that he had not received the money, yet it may fairly be implied from the contents of that letter, that he wished his employers to infer that he had not received it. This letter was received by his employers in Middlesex, and it is the same as if he said to them in Middlesex that he had not received the money. The question is, was the offence of embezzlement complete on the writing of that letter in the county of York. I am not prepared to say that on the writing of that

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letter there was not evidence of a complete embezzlement, and that the prisoner might not have been indicted for it in Yorkshire; but the fact that the letter was received by the employers in due course of post in Middlesex, and until its delivery the false statement that the money had not been received by the prisoner was never made to or reached them, in my opinion, upon the authority of *Rex v. Burdett* and several other cases, shows that the offence of embezzlement was complete in the county of Middlesex. The cases of *Reg. v. Taylor* and *Reg. v. Murdock* are authorities in affirmance of the same principle. In *Reg. v. Murdock* it was the prisoner's duty to go into Derbyshire every Monday and to sell goods and receive money for them there, and to return with it to his master in Nottingham on the Saturday. Having received two sums in Derbyshire, he did not return on the following Saturday, nor at all to his master, but appropriated them to his own use. About two months afterwards the master met the prisoner in Nottingham, and asked him what he had done with the money. He said he was sorry for what he had done; he had spent it. The Court held that that was evidence of an admission of the offence in the county of Nottingham, for which the prisoner could be indicted in the county of Nottingham. Under these circumstances I am of opinion that the conviction should be affirmed.

FIELD, J.—I also am of opinion that this conviction should be affirmed, and I have come to this conclusion on the ground that a material part of the offence was committed in the county of Middlesex. It was not the duty of the prisoner to remit the specific money which he had received, but it was his duty to remit that money or its equivalent at once to his employers, *i.e.*, in the course of the week in which he received it. On the 18th day of April the prisoner received the money in question at York, and on the 19th and 20th the prisoner was at Hull, and wrote letters to his employers in London, saying nothing about the receipt of the money at York. Again on the 21st, when at Doncaster, he wrote a letter to his employers in London; and, in answer to a question left to them, the jury say that the prisoner intended that the prosecutors should understand from the statements in that letter that he had not then received the amount in question; and the prisoner had thus in effect rendered a wilfully false account. Upon these facts the question arises whether any material part of this offence was committed in the county of Middlesex? Starting with this, that the law presumes every man to be innocent till he is proved to be guilty, I am at a loss to find any evidence of the complete offence of embezzlement in Yorkshire, except the writing and posting there of the letters addressed to the prisoner's employers in Middlesex. On the authority of *Evans v. Nicholson* (45 L. J. 111, C. P., n. 4) which decided that a letter, in which the defendant admitted a debt and promised to pay it, addressed to and received by the plaintiff in the City of London, was evidence of an account stated in the



City of London, I think that the letter of the 21st day of April addressed to and received by the prosecutors, and intended to act on their minds, in Middlesex, was in effect an act done by the prisoner in Middlesex. The case to my mind is the same as if a man standing in one county with a long spear or a pistol kills or injures a man in the adjoining county, or as if a man with one leg in one county and one in another does a criminal act. So as to a letter posted in one county and received in another. There may have been evidence on which the prisoner might have been properly convicted in Yorkshire; but I am clearly of opinion that there was evidence which justified his conviction in Middlesex. In *Rex v. Burdett* (4 B. & Ald. 95), which has been followed universally, the libel was contained in a letter written in county L., but received in county M., and it was held that the defendant might be indicted in either county. The case of *Rex v. Taylor* (3 Bos. & Pul. 596) also makes the matter very plain. In that case the prosecutor's servant received 10s. for him in the county of Surrey, after which the same evening he returned to his master, in the county of Middlesex, who asked him if he had brought the money, and the prisoner said he had not, and that it had not been paid to him; and it was held that he was properly indicted in the county of Middlesex. Lord Alvanley, C.J., said: "The receipt of the money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. It was not proved that the money ever was embezzled until the prisoner was in the county of Middlesex. . . . In such a case as this, even if there had been evidence of the prisoner having spent the money in Surrey, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute until he was called upon by his master to account." The act of non-accounting is a continuing act, and extended in the present case to the time of the receipt of the prisoner's letter of the 21st day of April in the county of Middlesex. That was the first act from which it is possible to say with certainty that the prisoner intended to embezzle the money. Maule, J., put the matter in much the same way in *Reg. v. Murdock*: "It appears to me that there was evidence to go to the jury that the offence was committed when the prisoner met his master in Nottingham, and, being asked by him for the money, did not pay over the amount." I think, therefore, that the conviction should be affirmed.

HUDDESTON, B.—I have the misfortune to differ from the other Judges of the Court. I think that the conviction was not right for the following reasons:—first, let us consider what the offence of embezzlement is. It is thus defined by the 24 & 25 Vict. c. 96, s. 68: "Whosoever being a clerk or servant, or being employed for the purpose, or in the capacity of a clerk or

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servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to, or received or taken into possession by him for or in the name or on account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer.” The act of embezzlement is therefore a stealing of the master’s money. The evidence of the act of embezzlement is the receipt of the money by the servant, and the appropriation of it to his own use; and the non-accounting or refusal to account for the money received is evidence merely to show that the servant has stolen it. In the present case the facts show that it was the prisoner’s duty to have remitted the moneys received at once to his masters. By hat I do not understand to remit in the course of the week, but by the next post, or within a reasonable time. The prisoner received the money on the 18th day of April at York, and he wrote two letters from Hull on the 19th and 20th days of April, by each of which he ought, in the course of his duty, to have remitted the money, and his not having done so was very good evidence that he had then appropriated to his own use the money which he had received at York on the 18th. Then again on the 21st day of April, when at Doncaster, he wrote a letter to his masters, by which, as the jury have found, the prisoner intended his masters to believe that he had not then received that money, and he had thus, in effect, rendered a wilfully false account. There is strong evidence that before the 19th or 20th day of April, and on the finding of the jury, strong evidence that on the 21st the prisoner had embezzled the money in Yorkshire; and I think therefore that the stealing of the money took place in Yorkshire. The offence was a complete offence in Yorkshire when the letter containing the statement that he had not received it was written and posted. When it reached the master’s mind, in my opinion, is not material. When the letter containing the false statement was put in the post it could not be recalled, and if the letter had not reached its destination the offence would have still been complete in Yorkshire. So far as regards principle. Then how stands the case as to the authorities? As to the cases of libel and false pretences: in libel the main ingredient is the uttering or publication of the libel, and in *Rex v. Burdett* the libel was published where the letter was received, in the county of Middlesex. So, as to the crime of false pretences, the offence is not complete until the false pretences reach or are made to the person intended to be defrauded. In the case of a false pretence made by letter, the offence is not complete until the letter is received. As to the cases of embezzlement. In *Rex v. Hobson* the prisoner received the money in Shropshire, his orders being to take it to his master in Staffordshire the same night. He did not take it, but on the following evening told his master in Staffordshire that he had not received it; and the majority of the Judges were of opinion that the indictment might be tried in Shropshire, where the prisoner

received the money, "the statute having made the receiving property and embezzling it amount to a larceny, made the offence a felony where the property was first taken, and the offender might therefore be indicted in that or in any other county into which he carried the property." In the case of *Rex v. Taylor* the prisoner, after receiving the money in Surrey, returned to his master in Middlesex, and told him he had not received it, and that was held to be good evidence of the offence having been committed in Middlesex, because there was nothing to show that the prisoner had appropriated the money to his own use in Surrey. Lord Alvanley, C.J., in delivering the judgment of the Court, said: "In the present case no doubt can be entertained. The prisoner, being sent over Blackfriars Bridge into the county of Surrey, there received 10s. for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of Middlesex. It was not proved that the money ever was embezzled until the prisoner was in the county of Middlesex. In cases of this sort the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by showing an intention in the receiver to appropriate the thing to his own use. Thus, if a servant receive a horse for his master, and sell it before he gets out of the county where he first received it, it might be said that he is guilty of the whole offence in the county." In the present case the receipt of the money was in Yorkshire, and the three letters written in Yorkshire were evidence of the prisoner's intention to appropriate the money in Yorkshire, and therefore the offence was complete in Yorkshire. Lord Alvanley, C.J. then proceeds: "But, with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars Bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. In this case there was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty, within the statute until he refused to account to his master. We are, therefore, of opinion that the prisoner was properly indicted in the county of Middlesex." Here the first act—the receipt of the money—was in

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Yorkshire, and all the three letters, evidencing the intent to appropriate the money, were written in Yorkshire. The offence therefore, in my opinion, was complete in Yorkshire. This opinion is supported by the judgment of Maule, J. in *Reg. v. Murdock*. Lord Campbell, C.J. there said: "The jury may have thought that the story which the prisoner told of having spent the money was false, or that he had spent it in the town of Nottingham." Parke, B. said: "I think on consideration that there was evidence for the jury of an embezzlement in Nottingham by reason of the prisoner's not returning and accounting to his master in Nottingham as he ought to have done. The fact of his spending the money is not of itself a sufficient embezzlement." Maule, J. said: "I agree in the conclusion at which my Lord Campbell and my brother Parke have arrived; but I do not agree in the view which the latter has taken of the matter. It appears to me that there was evidence to go to the jury that the offence was committed when the prisoner met his master in Nottingham, and, being asked by him for the money, did not pay over the amount. The mere omission to account, if the prisoner never had returned to the town of Nottingham, would not in my view of the law have rendered him liable to be tried in Nottingham. Suppose that he had gone to Derbyshire and spent the money there, and stayed there six months, and had never returned to Nottingham, but had been afterwards apprehended in Derbyshire, according to my brother Parke's view the prisoner would have been indictable in Nottingham. But I cannot think that that can be the case. The man, when he went into Derbyshire, went upon a lawful errand: it was his duty to receive the money. If he never afterwards returned into Nottingham, he could not, I think, be guilty of embezzlement in Nottingham. The cases which say that non-accounting is sufficient evidence of embezzlement have all this fact, that the man is in the county in which he refuses to account." Martin, B. took the same view as Maule, J. in that case. In my opinion, therefore, the crime of embezzlement is complete the moment the servant intends to steal his master's money, and here that was shown to be in Yorkshire. In *Reg. v. Davison* it was held, and as I think correctly, that the non-accounting was not the crime of embezzlement. The stealing is the crime, the non-accounting merely evidence of it; and, as the evidence in the present case shows that the stealing was in Yorkshire, I think, therefore, that there was no jurisdiction in the county of Middlesex, and that the conviction cannot be sustained.

LINDLEY, J.—I am of opinion that this conviction should be affirmed on the ground that a material part of the offence, that is, the fraudulently non-accounting for the money, was committed in the county of Middlesex by the posting at Doncaster of the letter of the 21st day of April addressed to and received by and intended to reach the prosecutors in Middlesex. In that letter

there was a fraudulent representation made in Doncaster, which continued until it reached the master of the prisoner in Middlesex. That was a fraudulent act, and a continuing act; and I am therefore of opinion that there was jurisdiction to try this indictment in the county of Middlesex.

MANISTY, J.—I am also of opinion that the conviction should be affirmed. The consequences would be very serious if we were to hold that a prisoner could only be indicted in the county in which the offence was first committed. Take the present case. The prisoner was arrested on the 2nd day of May, in Newcastle; and there was evidence that he had then appropriated the money, and there was evidence of the embezzlement therefore in Newcastle. If he had been indicted there, could the prisoner have said, I committed the offence in the county of Middlesex by fraudulently stating I had not received the money, and therefore I ought to be tried there? Here he wrote from Yorkshire to his masters in Middlesex, which is just the same as if he in person had said it in the county of Middlesex. He was properly indicted in Middlesex, although he might also have been indicted in Yorkshire.

*Conviction affirmed.*

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## COURT OF CRIMINAL APPEAL.

*Saturday, Jan. 19, 1878.*

(Before COCKBURN, C.J., CLEASBY, B., LINDLEY, J., MANISTY, J.,  
and HAWKINS, J.)

REG. v. KNIGHT. (a)

*Debtors Act 1869—Indictment—Aider by verdict—Obtaining credit by false pretences and fraudulently disposing of goods within four months before liquidation—32 & 33 Vict. c. 62, s. 11, subsects. 14 & 15.*

*An indictment charged that the defendant, a trader, “did within four months next before the commencement of the liquidation by arrangement of his affairs obtain from W. goods upon credit under the false pretence, &c., with intent to defraud.” And in another count in similar terms the defendant was charged with unlawfully disposing of the goods otherwise than in the ordinary*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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*way of his trade. Both counts were framed under sect. 11, sub-sects. 14 and 15, of 32 & 33 Vict. c. 62.*

*Held, that the counts were good after verdict, and sufficiently averred that the defendant was a person whose affairs were liquidated by arrangement within the meaning of sect. 11.*

**A**T the General Quarter Sessions of the Peace for the borough of Birmingham, held at Birmingham, before the Recorder, on the 22nd day of October, 1877, an indictment, of which the following is a copy, came on to be tried against the defendant, framed upon sub-sects. 14 & 15 of 32 & 33 Vict. c. 62 (The Debtors Act, 1869).

Borough of Birmingham to wit.—The jurors for our Lady the Queen, upon their oaths present, that heretofore and before the committing of the offences by William Augustus Knight as hereinafter mentioned, the said William Augustus Knight was a trader within the true intent and meaning of the laws then and now in force relating to bankrupts. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 12th day of April, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from Westwick and Co., spice merchants of London, five cases of Cochin Ginger upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

2nd count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 9th day of May, 1877, the said William Augustus Knight did, within four months next, before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), five cases of Cochin Ginger, which he had obtained on credit, and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

3rd count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 3rd day of May, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from Joseph Brook and Co., of Birmingham, twenty cads (or boxes) of Caper Tea upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.



4th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit) on or about the 8th day of May, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), twenty cads (or boxes) of Caper Tea which he had obtained on credit and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

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5th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit) on or about the 28th day of May, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from William Lloyd, of Birmingham aforesaid, three boxes of Toby and Booth's bacon and two boxes of Toby and Booth's hams, upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

6th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the said 28th day of May, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), three boxes of Toby and Booth's bacon, and two boxes of Toby and Booth's hams, which he had obtained upon credit and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

7th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 1st day of June, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from H. H. and S. Budgett and Co., of Bristol, five boxes of bacon upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

8th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on the said 1st day of June, 1877, the said William Augustus Knight did, within four months next, before the commencement of the liquidation by arrangement

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of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), five boxes of bacon which he had obtained upon credit and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided.

9th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the 7th day of June, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, obtain from Charles Wood and Co., of Liverpool, ten boxes of cheese upon credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, and has not paid for the same, with intent to defraud, against the form of the statute in such case made and provided.

10th count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that whilst the said William Augustus Knight was such trader as aforesaid (to wit), on or about the said 7th day of June, 1877, the said William Augustus Knight did, within four months next before the commencement of the liquidation by arrangement of his affairs, unlawfully dispose of, otherwise than in the ordinary way of his trade, certain property (to wit), a large quantity of cheese which he had obtained upon credit, and had not paid for, with intent then and there to defraud, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

In the course of the trial proof was duly made, by the production by an official of the County Court of Warwickshire, holden at Birmingham, of the proceedings under the seal of the said Court relating thereto :

1. That the said William Augustus Knight had, upon the 19th of June, 1877, filed in the said Court his petition for the liquidation of his affairs by arrangement under the provisions of 32 & 33 Vict. c. 71 (The Bankruptcy Act, 1869).

2. That trustees under the said liquidation had been subsequently duly appointed.

3. That the liquidation proceedings under the said petition were still pending.

The defendant was acquitted on the third and fourth counts of the said indictment, and convicted on the remaining eight counts.

After the verdict was returned by the jury, but before sentence was passed, a motion was made by the counsel for the defendant in arrest of judgment to quash the counts of the said indictment on which the defendant had been convicted, on the ground that they were bad on the face of them, and were not cured by the verdict inasmuch as :

1. The above-mentioned counts of the said indictment con-



tained no averment of any offence under the Debtors Act, 1869.

2. There was no averment in any of the above-mentioned counts of the said indictment that the defendant was a person adjudged bankrupt, or was a person whose affairs were or had been liquidated by arrangement in pursuance of the Bankruptcy Act, 1869.

3. There was no averment in any of the above-mentioned counts of the said indictment of the filing of any petition for liquidation of his affairs by arrangement pursuant to the Bankruptcy Act, 1869, by the said defendant or the appointment of a trustee under any such liquidation proceedings.

4. There was no substantive or certain averment of any liquidation proceedings whatever under the Bankruptcy Act, 1869, in any of the above-mentioned counts of the said indictment.

Upon hearing counsel on both sides I overruled the objection, but on the application of the counsel for the defendant I stated my intention to send up a case for the decision of the Court for Crown Cases Reserved; and I therefore postponed judgment on the conviction and discharged the defendant on recognisance of bail to appear and receive judgment if called upon.

If the Court should be of opinion that all the above-mentioned counts of the said indictment are bad after verdict, then they are to be quashed; but if the Court should be of opinion that any of the said counts are good, then the verdict on those counts is to stand, and the defendant is to come up for judgment accordingly.

*R. Harris* (*T. M. Oulmore* with him) for the defendant.—It is submitted that the indictment is bad after verdict. The 32 & 33 Vict. c. 62, s. 11, begins thus: "Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act 1869, shall in each of the cases following be deemed guilty of a misdemeanour." Then sub-sects. 14 and 15, on which the indictment is framed, enact: "If within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he being a trader, obtains, upon the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud." Sub-sect. 15: "If within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he being a trader, pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud." In order to convict a person under those sub-sections it must appear either that he has been adjudicated a bankrupt, or that his affairs have been liquidated by arrangement; and the indictment must show

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on the face of it that the defendant is a person on whom those sub-sections can operate. A man may file a petition for liquidation, but if the liquidation is not carried out and goes off, he is not within the purview of sect. 11: (*Reg. v. Oliver and Austin*, 13 Cox C. C. 588.) The principle of that case is applicable to this case. [COCKBURN, C.J.—You must read the indictment with reference to sect. 19 of the Debtors Act, which seems to me to set at nought the rules of criminal pleading: “In an indictment for an offence under this Act it shall be sufficient to set forth the substance of the offence charged in the words of this Act; specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any Court under, the Bankruptcy Act, 1869.] In *Reg. v. Oliver and Austin*, Lush, J., said that sect. 19 only makes an indictment good when it states the offence in substance. This indictment does not state the offence in substance, for it nowhere avers that the defendant’s affairs were liquidated by arrangement, which is a necessary ingredient to bring the defendant within the operation of sect. 11. The only difference between the present case and *Reg. v. Oliver and Austin* is, that that was a bankruptcy and the present a liquidation by arrangement. [MANISTY, J.—No; the indictment was very different. In that case Kelly, C.B., said: “I am of opinion that no such amendment or intendment as suggested can be made, when the contrary is alleged as here.” We have not that difficulty to get over in this case. LINDLEY, J.—Do you contend that the words “are liquidated,” in sect. 11, mean “have been liquidated,” and that no offence can be committed by a person when the liquidation turns out abortive?] Yes. Again, the indictment does not show that the liquidation ever commenced, for by sect. 125, sub-sect. 4, of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), a liquidation by arrangement shall be deemed to commence from the date of the appointment of the trustee. It does not appear on the face of the indictment that a trustee was ever appointed. So that the most that can be inferred from the indictment is that at some time proceedings for a liquidation had commenced, but what became of them does not appear; they may have dropped, or the defendant may have paid 20s. in the pound.

*Rosher* for the prosecution.—The indictment is good after verdict. In *Reg. v. Oliver and Austin* the motion to quash the indictment was expressly made on the ground that it was bad on the face of it, and repugnant; and the repugnancy was the chief difficulty in that case. Here there is no repugnancy, and according to sect. 19 of the Debtors Act, it is sufficient, for it contains all the requisites to constitute the offences charged; it follows the words of sect. 11, and shows substantially the offence charged. Secondly, the objection was made too late. If it had been taken before verdict, an amendment might have

been made. Again, this, if a defect at all, is one that is cured by the 7 Geo. 4, c. 64, s. 21, which enacts that, where the offence charged has been created by any statute, the indictment shall, after verdict, be held sufficient if it describe the offence in the words of the statute. Cases cited: *Nash v. The Queen* (4 Best & Sm. 935; 33 L. J. 94, M. C.); *Hayman v. The Queen* (8 L. Rep. Q. B. 102; 12 Cox. C. C. 383); *Reg. v. Goldsmith* (L. Rep. 2 C. C. R. 74; 12 Cox C. C. 479.)

*Harris* in reply.—No doubt a defective averment, as in the cases cited, may be cured by proof, and the objection is too late after verdict; but in the present case it is contended there was no averment at all of any offence. It is not enough to show that there has been a commencement of a liquidation, which is the utmost that can be inferred in the present case.

COCKBURN, C.J.—I am of opinion that this indictment should be upheld and that the conviction should stand. In the first place, as to the case of *Reg. v. Oliver and Austin*, that is not an authority in point in this case. The indictment in that case contained an allegation not to be found in this indictment, viz., “that before the committing of the offence next hereinafter mentioned, to wit, on, &c., I. Oliver and T. Austin were adjudicated bankrupts, and that they afterwards, with intent to defraud, &c., within four months next before the presentation of a bankruptcy petition against them,” committed the offence charged. The objection was that it was not stated in that indictment in a form sufficient to satisfy the statute, that there was any adjudication of bankruptcy upon the petition within four months of which it was alleged that the bankrupts had committed the offence—the adjudication of bankruptcy being the *status à quo* the offence proceeds. It cannot be disputed that an adjudication in bankruptcy, or a liquidation by arrangement in pursuance of the Bankruptcy Act, 1869, is essential to the completion of the offences created by sect. 11 of the Debtors Act, 1869, and, as in this indictment, there is no express allegation that the defendant’s affairs were being liquidated, the indictment would be defective unless the defect is cured by sect. 19 of the Act, which uses strong terms, or is aided by verdict. There is a difficulty in getting over that enactment, framed as it is in such general terms; but at the same time I am reluctant to disregard the rule of criminal pleading that an indictment must state all the matters that are essential to the charge contained in it. Sect. 19 may be construed, I think, not to do away with the necessity of the allegation of the essential matters which constitute the offence, but to prevent the necessity of alleging the details of the adjudication of bankruptcy or liquidation by arrangement; and I think it is sufficient to allege in the indictment that the defendant was adjudicated a bankrupt, or that his affairs were liquidated by arrangement, and that he committed the offence within four months before the presentation of the bankruptcy petition or the commencement of the liquidation. It is not necessary in the

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present case to decide whether the allegation in this indictment is sufficient upon demurrer, for we are dealing with an objection made to the indictment after verdict. Now, I think that, though it is informally stated in the indictment, yet that it may be implied by reasonable intendment from the indictment that the defendant's affairs were being liquidated by arrangement, and if so the indictment may be sustained. Now, the indictment states that the defendant did, within four months before the commencement of the liquidation by arrangement of his affairs, obtain, &c., which seems to me to amount, by necessary implication, to an allegation that there was a liquidation by arrangement of the defendant's affairs under the statute. That being so, I am of opinion that the averment may, after verdict, be treated as an informal one, and cured by necessary intendment. I give no opinion whether it was an objection or not which might have been taken before verdict.

CLEASBY, B.—I also think that the conviction should be affirmed. It appears to me that there was nothing in the objection to the indictment after it was proved, that trustees were duly appointed, for by sect. 125, sub-sect. 7, of the Bankruptcy Act, 1869, the appointment of a trustee under a liquidation is to be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy, so that at no time can there be a liquidation by arrangement unless a trustee is duly appointed. Then as to the goodness of the indictment, we must look at sect. 19 of the Debtors' Act, 1869, which enacts that "in an indictment for an offence under this Act, it shall be sufficient to set forth the substance of the offence charged in the words of the Act,"—very general words. In the present indictment the words of the Act are followed, and the defect alleged is the want of a distinct allegation that there was a liquidation by arrangement of the defendant's affairs. Now, sect. 19 says that it shall not be necessary to allege or set forth any adjudication under the Bankruptcy Act, 1869, or, what is the same thing, any liquidation by arrangement of the defendant's affairs. The words of the indictment "within four months next before the commencement of the liquidation by arrangement" are equivalent to within four months next before the appointment of trustees, which, by sect. 125, sub-sect. 7, of the Bankruptcy Act, 1869, are "to be deemed equivalent, and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy." I think, therefore, that the averment was sufficient after verdict.

LINDLEY, J.—I also think that the conviction ought to be affirmed. After verdict it is unnecessary to say whether the indictment might or might not have been quashed if the objection had been taken by demurrer. It appears to me, I must confess, to be drawn in a lax form. There is a marked distinction between this indictment and that in *Reg. v. Oliver and Austin*,

and that case, to my mind, appears to support our decision in this case. It is necessarily implied in the words "within four months next before the commencement of the liquidation by arrangement of the defendant's affairs," that the defendant had presented a petition for the liquidation of his affairs by arrangement, which must mean that the defendant was a person who had presented a petition for the liquidation of his affairs by arrangement, and that a trustee had been appointed. In correct legal language no proceedings for a liquidation of a debtor's affairs by arrangement do commence until a trustee has been appointed. Therefore the averment must mean that the liquidation proceedings had commenced and a trustee been appointed. In *Reg. v. Oliver and Austin* the indictment said that the "defendants were adjudicated bankrupts, and that afterwards, with intent to defraud, &c., within four months next before the presentation of a bankruptcy petition against them," they committed the offence charged, and the court held that they were unable to say whether the defendants had been adjudicated bankrupts at all upon the presentation of the petition mentioned. In the present case the averment necessarily involves that there was a liquidation by arrangement. The only other point material to be noticed is that the statute (sect. 11) does not mean a person whose affairs have been liquidated by arrangement, but are being liquidated by arrangement. Construing it after verdict I think that this indictment does sufficiently set forth the substance of the offence charged.

MANISTY, J.—I also think that the conviction should be upheld. Liquidation of the affairs of a debtor by arrangement is the creation of the Bankruptcy Act, 1869, s. 125; and it does not commence by the presentation of a petition, but by a meeting of creditors passing a special resolution, and appointing a trustee. The offence charged in this indictment is that the defendant, being a trader within the meaning of the bankrupt laws, "did within four months next before the commencement of the liquidation by arrangement of his affairs," commit the offence charged. All that is necessary to set out according to sect. 19 is the substance of the offence charged in the words of the Act specifying the offence. I agree with my brother Lindley that sect. 11 means a person whose affairs are being liquidated by arrangement. Then how could the offence be committed within four months next before the commencement of the liquidation, unless the act which constitutes the commencement had been done. As at present advised, I think the indictment is good upon the face of it, but after verdict I think it was clearly sufficient.

HAWKINS, J.—I also think that the conviction should be affirmed. I base my judgment on the ground that the objection to the indictment was not taken until after verdict. If the objection had been taken in time I doubt whether the indictment could be considered good. I find the rule on this subject thus

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laid down : “ Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict by the common law : ” (*Stennell v. Hogg*, Wms. Saun. 22.) Now what facts would it have been necessary to prove in support of the charge in the indictment? It would be necessary to prove, first, that the defendant was a trader; secondly, that his affairs were being liquidated by arrangement; thirdly, that he obtained goods on credit with intent to defraud; fourthly, within four months before the commencement of the liquidation. After verdict it must be taken that all these matters were found by the jury, and therefore I think that this indictment is sufficient after verdict.

*Conviction affirmed.*

## NORTH AND SOUTH WALES CIRCUIT.

### CHESTER WINTER ASSIZES.

*Feb. 1, 5, and 6, 1878.*

(Before Mr. Justice LUSH.)

REG. v. ELLEN HEESOM. (a)

*Murder—Poisoning—Postponement before bill sent up—Evidence—Deposition—Pregnancy of witness—Evidence—Subsequent and previous deaths by poison—Motive in each case admissible.*

1. *Upon a charge of murder, by poison, the presentment of a bill to the grand jury cannot be postponed to the next assizes, on the ground that other and like charges may before that time be brought against the prisoner, and if no bill is so presented the prisoner is entitled to be discharged.*
2. *It was proposed to read, on the trial at the Assizes, the deposition of a witness called before the magistrates, on the same charge, now absent by reason of pregnancy. Evidence given by a doctor on February the 5th, that he had last seen the witness on the 29th day of January, and that she then was daily expecting her confine-*

(a) Reported by E. JULYAN DUNN, Esq. (with the approval and concurrence of Mr. Justice Lush.)



ment, but which had not yet taken place, was held to be sufficient to entitle the deposition to be read at the trial on the 5th of February.

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3. Upon an indictment for murder by poison of S. in October, 1877, evidence is admissible of the previous and subsequent deaths of J. and L., under like circumstances and from similar symptoms, to show that the poisoning was not accidental: and where it is proved that a motive for the death of S. might exist, by the fact of the prisoner having insured the life of S. in a benefit and insurance society, evidence may also be given upon the same indictment that there might be an equal motive for the deaths of J. and L. by showing that they also, were each of them insured by the prisoner in the same or kindred societies.

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**E**LLEN HEESON, otherwise Ellen Johnson, was charged before the magistrates with the murder of her infant child Sarah Heeson, by poison, at Lower Walton, on the 3rd day of October, 1877, and also with a like murder of her mother Lydia Sykes, at the same place, on the 5th day of November, 1877, and committed for trial on those two charges.

J. W. Bowen, Q.C. and E. Julyan Dunn were instructed to prosecute on behalf of the Treasury.

E. Swetenham for the prisoner.

The prisoner having been committed on or about the 22nd day of January, 1878, by the magistrates and coroner for trial for these murders, at the Winter Assizes held at Chester on February the 1st and following days, before a bill was sent up to the grand jury, Bowen, Q.C. applied to the court to allow the cases against the prisoner to be postponed to the next assizes. His reasons for so applying were as follows: Between the 22nd day of January and the commission day certain evidence had been obtained implicating the prisoner in a third charge of murder under like facts, which would be included in the investigations of the two cases on which the prisoner had already been committed for trial. But the chemical analysis was not yet completed in this third death, and, as this class of evidence would be an important element in the case, he did not wish to proceed, even at this early stage, and to the prejudice of the prisoner. [LUSH, J.—How can I postpone the trial until a bill is found? If one is not found at these assizes, the prisoner will be entitled to her discharge, on bail, though of course she may be arrested immediately afterwards on the new charge.]

Bowen, Q.C. cited *Reg. v. Palmer* (6 C. & P. 652).

LUSH, J.—That case will not help you, it being an application founded on the absence of a material witness for the Crown, which is provided for by the Habeas Corpus Act (31 Chas. 2, c. 2, s. 7.) If, after a bill is found, you renew your application, I will then consider the matter; but, unless the prisoner consents, I cannot say that at present I see any ground for a postponement.

A bill having been found and the prisoner wishing the

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case to proceed, the trial commenced on the 5th of February, the indictment for murdering Sarah Heesom being the one taken.

During its progress Counsel for the Crown proposed to put in the deposition of Mary Owen, a witness who had been called before the magistrates and who was unable to attend to give evidence at Chester. They called a doctor, who testified that he had seen the witness Mrs. Owen on the 29th day of January last and that she was then daily expecting her confinement, but he did not know if she had yet been actually confined; she lived about an hour's journey from Chester, but it would be dangerous for her to travel that distance.

*Swetenham* thereupon contended that this was not sufficient to entitle the deposition to be read, and referred to Archbold Criminal Pleading, p. 250, 17th edit., and the cases therein cited: *R. v. Parker* (York Summer Assizes, 1862); and *R. v. Omant* (6 Cox C. C. 466).

LUSH, J.—Pregnancy of a witness is not of itself sufficient to enable the deposition to be read; but, the question here is whether the witness is too ill to travel, I think upon the evidence that she is and shall therefore admit the deposition in evidence.

The case for the prosecution was as follows: The prisoner in the year 1870 was working at some glass works near Warrington, where they were in the habit of using white arsenic. She married a man named Johnson, and had a child by him named Lydia. She afterwards became acquainted with another man called Edward Heesom, with whom she had lived for about four years—up to in fact the institution of the present proceedings, they had lived together as man and wife, and were believed by the neighbours to be married. The result of her connection with Heesom was the birth of two children, Elizabeth, and Sarah. In 1876 they went to live at Lower Walton, nearer Warrington, and at that time the family consisted of Edward Heesom, the prisoner, Lydia Johnson, and Elizabeth Heesom. The child Sarah Heesom was born on the 2nd day of October, 1876, and after the removal to Walton. Neighbours were called, as witnesses, who proved that up to 3rd day of October, 1877, this child Sarah was a healthy one, though unable to walk. On that day, about half-past twelve, the child was seen in its usual condition; but between one and two Mrs. Moss, one of the neighbours, found her very ill, vomiting and purging most violently. As the child was teething, the doctor who was called in believed that the convulsions it also suffered from were thus produced, and when the death of the child followed, on the next day, he gave a certificate to that effect. No suspicion of foul play had then arisen, but afterwards the body was exhumed by order of the Secretary of State, and on the stomach being analysed, three grains of arsenic were found in it, half that quantity being quite sufficient to cause the death of an infant. It was also proved that in 1870 the prisoner might possibly have got at the white arsenic in the glass works



where she worked, no colouring matter, such as chemists are obliged to mix with arsenic on ordinary sale, being found in the child's stomach; and it was further proved that in March, 1876, the prisoner had stated to two neighbours that she had been cleaning her beds with arsenic, and in one instance had offered to give her friend some she had then in a particular cupboard for the same purpose. It was also proved that in November, 1876, the prisoner had effected an insurance on the child's life in the Prudential Assurance Society, through one of its agents named James Whitaker. By the payment of a penny a week she would be entitled to about 30s. if the child lived twelve months; and the sum she could so claim she applied for and received within a few days after the child's death. Moreover, Edward Heesom, the prisoner's alleged husband, was insured in a benefit club, and would therefore be entitled to some small sum (about 20s.) on the death of any of his children; the sum to be paid varying with the age of the child at its decease.

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In order to show that the poisoning was not accidental, it was proposed to prove, on the authority of *Reg. v. Cotton* (12 Cox C. C. 400), and *Reg. v. Roden* (*idem*, 630), and *Reg. v. Garner* (4 F. & F. 346), that Lydia Johnson had died in March, 1876, in the prisoner's house, and had immediately before her death unaccountably suffered from violent vomitings, purgings, cramps, convulsions, and other similar symptoms to those noticed in Sarah Heesom's illness on the 3rd day of October and just preceding her death—and also that Lydia in fact died from arsenical poisoning. To this no objection was raised by the Court or Counsel when the above cases had been cited, and evidence to this effect was therefore given.

It was also proposed to further strengthen the theory for the prosecution, by showing that the prisoner's mother, Lydia Sykes, came to visit the Heesoms on the 3rd day of November, 1877, and that the next day she, also, was inexplicably seized in exactly the same way as the two children who had died by poison had been taken,—and that Mrs. Sykes, in fact, also died from it.

LUSH, J.—Can you give evidence of a subsequent poisoning as well as of a previous one?

DUNN submitted that such evidence could be given upon the authority of *Reg. v. Gearing* (18 L. J., M. C. 215), where Pollock, C.B., after consultation with Alderson, B., and Talfourd, J., said: "I think such evidence, *i.e.*, of a subsequent poisoning, may be given. The tendency of it is to prove and confirm that the proof of the death of the husband already given, whether felonious or not, was occasioned by arsenic; in this view of the case, I think it is wholly immaterial whether the deaths of the two sons took place before or after the husband's death (which was the subject of the indictment). The domestic history of the family during the period in which all the deaths occurred is also receivable in evidence, to show that during that time arsenic had been taken by four members of it, with a view to enable

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the jury to determine whether such taking was accidental or not. Nor is such evidence inadmissible as having a tendency to prove or create a suspicion of a subsequent felony :” (See also *Reg. v. Dossett*, 2 C. & K. 306.)

LUSH, J.—Very well, then, I shall follow that case, and admit evidence relating to Mrs. Sykes’ death, in November, 1877. Such evidence was therefore given.

2nd day.—Feb. 6.—It was still further proposed to show, not only that Sarah Heesom’s life was insured by the prisoner in the Prudential and another society, but also that by the death of both Lydia Johnson and Mrs. Sykes, the prisoner would benefit pecuniarily, she having insured and paid premiums on their lives. To do this, the Crown called

The Rev. Richard Greenall, vicar of St. Thomas, Stockton Heath, who testified that the books of that Church Sunday School Sick and Burial Club, showed that Lydia Johnson entered the club in 1874.

*Swetenham* here interposed, saying that this was extending the doctrine, accepted on the previous day, as to evidence being admissible of other poisonings, if the Crown were allowed to show motives for those deaths. Would his Lordship reserve the point ?

LUSH, J. said.—I cannot do that ; it might defeat the whole proceedings. If I entertained any doubt, I should reject the evidence. I cannot help thinking it is within the principle of *Reg. v. Gearing*, namely, that evidence of the domestic history of the family during a period of four deaths in that family by poison can be received to enable the jury to decide under what circumstances the poison had been taken. If there had been no case on the point I would have paused to consider (continued his Lordship) whether the evidence could be received ; but, after the decision quoted, and with which I am quite satisfied, I have no doubt that it is competent to show that the death of the child Lydia Johnson was not due to the accidental taking of arsenic. To prove the intention you may show the motive, and this is a link in the chain of evidence. Though I feel satisfied the point is involved in the Chief Baron’s judgment, I will consult my colleagues on my return to town.(a)

Whereupon Mr. Greenall proved that the prisoner received from the club 5*l.* on the death of Lydia Johnson.

Evidence was also given that she received 6*l.* from the Prudential Assurance Society on the happening of the same event, and it was also proved, that the prisoner had insured her mother’s life in, and, on the death of her mother, received a somewhat larger sum from, the same society ; the policies in each case having been effected by the prisoner, and having been severally running but a short time before the deaths of the respective insured.

*Verdict guilty. Sentence, death ; but execution was respited owing to the prisoner’s pregnancy.*

(a) April 24, 1878. No case has been reserved upon the point.—E. J. D

## NORTH AND SOUTH WALES CIRCUIT.

CHESTER SUMMER ASSIZES, 1877.

(Before Lord Justice BRAMWELL.)

REG. v. JAMES CHAPPELL BENNETT. (a)

*Bigamy—Absence for less than seven years—Bonâ fide belief of death.*

*In an indictment for bigamy evidence is not admissible to show that the prisoner honestly believed that his first wife was dead, when he married a second, within seven years of his last having heard of or seen the first wife.*

*Semble, however reasonable such a belief may be, it can only be used in mitigation of punishment after conviction.*

**J**AMES CHAPPELL BENNETT, described as an auctioneer, was indicted for bigamy by going through the ceremony of marriage with Margaret Ann Dobbin at Walton, Lancashire, on the 30th day of April, 1876, his former wife being then alive.

*E. J. Dunn* prosecuted; *B. F. Williams* defended.

It was proved that the prisoner married a lady named Serjeant, at Norwood, in November, 1869, and that he lived with her some little time and then left her. He afterwards went through the form of marriage with Miss Dobbin, on the 30th day of April, 1876, at Booth, Walton, Lancashire, representing himself to be a widower. Miss Dobbin, on being cross-examined, stated that the prisoner while with her, treated her very well, but, upon re-examination, she admitted that he had only lived with her a short time after the ceremony, and, although he occasionally corresponded with her from Ireland, for twelve months he had sent her but 5*l.* or so, to live on during that period, and that out of her fortune of 100*l.* he had had 90*l.*, which he had entirely spent on himself.

*Williams* proposed to ask a witness if she had not told the prisoner before his second marriage that his first wife was dead, and also to give evidence that the prisoner said he had made inquiries in 1875, and found her reported to be dead.

No evidence was given by the prosecution that the prisoner had seen or heard of his wife between 1870 and the date of his second marriage.

(a) Reported by E. JULIAN DUNN, Esq., Barrister-at-Law.

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*Williams* cited *Reg. v. Turner* (9 Cox C. C. 145), and *Reg. v. Horton* (11 Cox C. C. 670).

*Dunn* in reply.—*Reg. v. Turner* has been overruled by *Reg. v. Gibbons* (12 Cox C. C.), which was the joint opinion of Willes and Brett, JJ., and that supposing *Reg. v. Horton* to be correct it would only help the defence if the jury were of opinion that the prisoner honestly believed his first wife was dead, which, from the evidence as to his character, they would hardly do. He contended that such evidence could only go in mitigation of punishment.

BRAMWELL, L. J., said.—And if it were necessary to decide that point, I think so too. The statute, moreover, seemed to me express, and the words are perfectly clear; and I cannot, and never do, recognise as a defence such a ruling as my brother Martin laid down in *Reg. v. Turner*. I shall, therefore, follow *Reg. v. Gibbons*, nor will I grant a case, but will ask the jury to convict the prisoner upon the evidence before them.

This was accordingly done, and, having also been found guilty of forgery and false pretences, the prisoner was sentenced to

*Ten years' penal servitude.*

See *Reg. v. Moore*, 13 Cox C. C. 544 (not then reported), when Denman, J., after consulting with Amphlett, L. J., followed *Reg. v. Turner*, and under the circumstances did not grant a case for consideration, the facts therein not meriting a severe punishment. His Lordship's judgment was not, however, to be taken as a final one.

## NORTH AND SOUTH WALES CIRCUIT.

CHESTER SUMMER ASSIZES, 1877.

(Before Lord Justice BRAMWELL.)

REG. v. FREDERICK WOOD. (a)

*Rape—Complaint made in the absence of the accused—Admissibility of.*

*Where a man is charged with committing a rape upon a female the full particulars of the complaint she made against him to other persons in his absence some time after the alleged offence may be given in evidence.*

FREDERICK WOOD, a striker, at Saltney, was indicted for rape upon Amelia Wild, at Chester, on the 4th day of March, 1877.

*E. J. Dunn* prosecuted.

*Swetenham* defended.

Miss Wild was barmaid at the Elephant and Castle Inn, North-

(a) Reported by E. JULIAN DUNN, Esq., Barrister-at-Law.

gate-street, Chester. On a Sunday evening, when the rest of the establishment were away, she was left about six o'clock alone in charge of the house. She stated that, when there by herself, the prisoner came in through the front door, which was not locked, found her in the parlour, and then committed the offence upon her in spite of her endeavours to prevent him. The prisoner then left the house and she at once went to the door to see for a policeman, but none was forthcoming. She stayed alone in the house till eight o'clock, about an hour and a half after the alleged rape, when a customer, Samuel Wainwright, came in, and to him she made a complaint mentioning Wood's name in connection with it.

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*Dunn* then proposed to ask the witness what she said to Wainwright, as nearly as she could remember, and what he said in reply, citing *R. v. Eyre*, 2 F. & F. 579, and Fitzjames Stephen on Evidence, p. 146.

BRAMWELL, L.J.—I shall admit the conversation: you give evidence of a complaint being made and use the name of the prisoner, leaving it to the jury to *infer* that the girl said that he had committed the offence that we are now trying him for. I do not see why you should not give in evidence all she said when she did so complain, leaving it to the jury to judge of the value of such testimony.

The witness then stated to the court all that she had told Wainwright, how that Wood had come into the house, had committed this assault upon her by insertion of his person, &c., having first thrown her down, torn and lifted up her clothes, and that she had screamed, &c., just as she had given the details in examination in chief. She also stated what replies Wainwright had made to her story. He also was called and corroborated the prosecutrix as to the making of the complaint, saying that she told him Wood had committed an indecent assault upon her and the words of it.

Another witness, who saw Miss Wild, also in the absence of the prisoner, at 10 p.m. the same night, gave similar evidence as to receiving the same complaint, and the words of it from her about Wood. In the result, in consequence of certain other evidence, (called by the defence) the verdict was

*Not guilty.*

## Ireland.

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### COURT FOR CROWN CASES RESERVED.

(Before MAY, C.J., O'BRIEN, J., FITZGERALD, B., FITZGERALD, J.,  
DEASY, B., and BARRY, J.)

Dec. 22, 1877.

REG. v. MICHAEL KELLEHER. (a)

*Indictment—False pretences—Statements of false pretences not  
negatived—Effect of verdict.*

*Where K. was indicted in the following form, that he did falsely pretend that he the said K. was one G., who had moneys deposited in the Cork Savings Bank, and who had a book of the said bank with a statement of his account in it, which book he the said K. presented to the cashier of the bank at the time he represented himself to be the said G., by means of which said false pretence the said K. obtained moneys, &c., whereas in truth K. was not the person so named in the said savings bank book, nor had he any authority then or at any other time from the said G. to present the said book at the savings bank for the purpose of drawing out money, neither had he, the said K., any authority from G. to draw money from the said bank, it was held that the subsequent portion of this indictment did not negative the previous averments and in consequence the indictment was quashed.*

CASE reserved for the opinion of the Court by the recorder of Cork. The prisoner, Michael Kelleher, was indicted as follows: that he "unlawfully, knowingly, and designedly did falsely pretend to one Edmond James Julian, cashier in the Cork Savings Bank, that he, the said Michael Kelleher was one James Goulding, who had moneys deposited in the said savings bank, and who [blank] a book of the said bank with a statement of his account in it, which said book he, the said Michael Kelleher, presented to the said Edmond Julian at the time he represented himself to be the said James Goulding, by

(a) Reported by CEOL R. ROCHE, Esq., Barrister-at-Law.

means of which said false pretence he, the said Michael Kelleher, did then and there unlawfully obtain from the said Edmond James Julian the sum of 10*l.* of the moneys of the said James Goulding with intent thereby them to defraud; whereas in truth and in fact the said Michael Kelleher was not the person so named in the said savings bank book, nor had he any authority then or at any other time from the said James Goulding to present the said book at the savings bank for the purpose of drawing out money, neither had he, the said Michael Kelleher, any authority from the said James Goulding to draw money from the said bank to the great damage and deception of the said (blank) to the evil example," &c. The evidence, as appeared from the report of the learned recorder, which for the purposes of the present report it is not necessary to set out at length, went to show that the prisoner obtained possession of the bank book of James Goulding who had money lodged in the Cork Savings Bank, that he passed himself off as James Goulding to the book-keeper, who gave him a ticket which he presented to Mr. Julian, the cashier of the bank, who thereupon paid him 10*l.* The jury convicted the prisoner. Counsel for the prisoner moved in arrest of judgment, first, that the pretences were according to the evidence incorrectly stated in the indictment; secondly, that the sum of 10*l.* was not paid by E. J. Julian because of the false pretence alleged, but because the book-keeper issued a ticket entitling the bearer to receive that sum from E. J. Julian; thirdly, that the money alleged to have been paid by the said E. J. Julian to the prisoner was not the money of James Goulding, but was the money of the trustees of the Cork Savings Bank; fourthly, that the averment of the false pretence in the indictment is uncertain, obscure, and unintelligible; fifthly, that the indictment does not contain a special averment showing in what respect the alleged false pretence or any part thereof is false, and that the special averment in the indictment does not negative the pretence as laid. The learned recorder declined to arrest judgment, but stated a case for this Court, virtually asking the Court to decide on the questions above stated.

*Lawrence* for the prisoner.—The law on the subject of what the indictment must contain is thus laid down by Lord Ellenborough in *Rex v. Perrott* (2 M. & S. 379): "The convenience also of mankind demands, and in furtherance of that convenience, it is part of the duty of those who administer justice to require, that the charge should be specific, in order to give notice to the party of what he is to come prepared to defend and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are to be impeached for falsehood." The strict way in which these indictments are construed will be seen in *Reg. v. Rouse* (4 Cox C. C. 7), and *Rex v. Hill* (R. & R. 190.) The indictment here is bad, as the false pretences alleged have not been negatived. The prisoner might have had an account in the bank under the name of James

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Goulding, that is perfectly consistent with the indictment, and its falseness has not been alleged.

*Holmes*, Q.C., with him *John G. Gibson* for the Crown.—It must be remembered that this is a case after verdict. There is a sufficient false pretence stated on the face of the indictment in its first portion. The defect, if any, has been cured by verdict: (*Heymann v. The Queen*, L. Rep. 8 Q. B. 102; *The Queen v. Goldsmith*, 12 Cox C. C. 594.) It is necessary to look at the entire indictment. The reason for setting out these false pretences is to enable the prisoner to raise the question on demurrer if the false pretence is insufficient in point of law. There are many statements of false pretences which do not require a subsequent denial, as if a man pretends he is another person.

The judgment of the Court was delivered by

MAY, C.J.—The Court are of opinion that the indictment cannot be sustained. The indictment states that “the prisoner knowingly and designedly did falsely pretend that he the said Michael Kelleher was one James Goulding, who had moneys deposited in the Cork Savings Bank and who had a book of the said bank with a statement of his account in it, which said book he, the said Michael Kelleher, presented to Edward Julian, the cashier of the bank, at the time he represented himself to be the said James Goulding, by means of which said false pretence the said Michael Kelleher obtained 10*l.* of the moneys of the said James Goulding, with intent to defraud; whereas in truth and in fact the said Michael Kelleher was not the person so named in the said savings bank book, nor had he any authority then or at any other time from the said James Goulding to present the said book at the savings bank, nor had he any authority then or at any other time from the said James Goulding to present the said book at the savings bank for the purpose of drawing out money, neither had he, the said Michael Kelleher, any authority from the said James Goulding to draw money from the said bank.” There is no averment in the indictment as to the person named in the bank book. It is clearly established that an indictment for obtaining money by false pretences should state the pretence, and should negative the truth of the matter so pretended with precision, so as to inform the prisoner with certainty of the charge made against him. The indictment does not contain any allegation that the prisoner pretended he was the person named in the bank book, nor that he pretended he had authority from Goulding to present the book or to draw money from the bank; and having omitted to allege any such pretences, as having been made by the prisoner, the indictment proceeds to negative their truth. The indictment does not negative the truth of averments which the prisoner is alleged to have made, but of others which he is not alleged to have made. It has been contended that these defects were cured by the verdict. But this not a case of matters of fact imperfectly stated, but which must have been sufficiently established in evidence in order to warrant a conviction, in which



case the defect would be cured by verdict. But the matters alleged in the indictment are substantially insufficient, and if assumed to be true do not disclose a criminal offence. The Court, therefore, is of opinion that the indictment cannot be sustained, and the conviction must be set aside.

*Conviction quashed.*

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## COURT OF APPEAL.

*Thursday, Jan. 24, 1878.*

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

LEYMAN v. LATIMER AND OTHERS. (a)

*Libel—Calling a man “a convicted felon” and “a felon editor”—  
Justification, that he had been previously convicted—Reply,  
punishment undergone—Demurrers—Statute 9 Geo. 4, c. 32, s. 4.*

*It is no justification for a libel which calls a man “a felon editor”  
to show that he had been convicted of felony and sentenced to a  
term of imprisonment on a certain charge. His actual guilt in  
fact must be shown, and also, since 9 Geo. 4, c. 32 (per Brett  
and Cotton, L.JJ., Bramwell, L.J. giving no opinion on the  
matter), that he has not undergone the punishment awarded him.  
The same holds of a libel that calls a man “a convicted felon,” if  
a jury should find that the libel meant anything more than  
merely that he had been convicted on a charge of felony at some  
past time.*

*Per Brett and Cotton, L.JJ.: 9 Geo. 4, c. 32, was passed, among  
other reasons, in order to restore convicts affected by it, after they  
had suffered the punishment awarded them, to their full civil  
rights and status.*

*Also (per same judges), demurrers which do not apply to the whole  
of the opponent's case ought not to be used.*

*Judgment of the Exchequer Division affirmed.*

*Cuddington v. Wilkins (Hob. Rep. 67, 81); and Hawkins P.C.,  
bk. 2, c. 37, s. 48, approved.*

**T**HIS was an action for libel brought by the plaintiff, the proprietor and editor of a newspaper published at Dartmouth, called the *Dartmouth Advertiser*, against the defendants,

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

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the proprietors, printers, and publishers of a newspaper published at Plymouth, called the *Western Daily Mercury*. The alleged libels, two in number, appeared in the latter paper, and were shortly as follows :

"The history of the *Advertiser* too must stand over. . . . its present editor is a convicted felon." This appeared in defendants' paper of the 24th day of April, 1876.

The second libel appeared on the 1st day of May, 1876 : "There still remain to be recorded Mr. Foster's controversies with the town council of Dartmouth . . . and the facts regarding his newspaper" (meaning the plaintiff's newspaper) "and its bankrupt and felon editor" (meaning the plaintiff). The statement of claim contained the usual allegations of falsity of the libels and damage.

The material part of the statement of defence was as follows :

3. The defendants deny that the word "bankrupt" in the quotation from their said newspaper, in the fifth paragraph of the statement of claim set out, was intended to, or did refer to the plaintiff.

4. And the defendants further say that the plaintiff has been convicted of felony, and was sentenced to twelve months' hard labour for stealing feathers.

5. The words in the fourth and fifth paragraphs of the statement of claim complained of were and are part of certain articles printed and published in the defendants' said newspaper, each of which articles was and is a fair and *bonâ fide* comment upon the conduct of the plaintiff in his public character, and as the nominal editor and proprietor of the *Dartmouth Advertiser*, a public newspaper, and was printed and published by the defendants as and for such comment, and without any malicious motive or intent whatever.

Plaintiff's reply and demurrer :

1. The plaintiff joins issue upon the first, second, and fifth paragraphs of the defendants' statement of defence.

2. As to the third paragraph of the statement of defence, the plaintiff admits the allegations in such third paragraph contained.

3. As to the fourth paragraph of the said statement of defence, the plaintiff (so that such admission be not in any way extended or taken to mean that he ever was, in fact, guilty of the offence referred to) admits the allegations contained in such fourth paragraph. But the plaintiff further says that he has never been convicted of felony save on that one occasion, which is the occasion mentioned in the said third paragraph of the statement of defence. On that occasion he was convicted of the supposed felony by a court duly having jurisdiction on that behalf, the Court of Quarter Sessions for the county of Cornwall; and the said court, having jurisdiction as aforesaid, in the exercise of such jurisdiction, adjudged that, as a punishment for the said supposed felony, the plaintiff should be imprisoned and kept

to hard labour for twelve calendar months. The said conviction took place several years ago, and the plaintiff, as the defendants very well knew, duly endured the punishment to which he was so adjudged as aforesaid, for the said supposed felony, and thereby became, and was, and has ever since been, and is, in the same situation as if a pardon under the Great Seal had been granted to him as to the said supposed felony whereof he was convicted as aforesaid.

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4. The plaintiff demurs to the said fourth paragraph of the statement of defence, on the ground that, while the statement of defence admits the publication of the whole of the libels alleged in the statement of claim, and the said paragraph is pleaded to the whole of the said libels, and a part of the libel charges that the plaintiff is a convicted felon, nevertheless the said fourth paragraph contains nothing which justifies, or is otherwise a defence to, that portion of the said libel; and the plaintiff also demurs upon other grounds sufficient in law to maintain this demurrer.

Demurrer by the defendants to the third paragraph of the plaintiff's reply.

This was an appeal from a decision of the Exchequer Division (consisting of Cleasby and Pollock, BB.), making absolute a rule for a new trial obtained by the plaintiff, and giving judgment for the plaintiff on the demurrers in the action.

The case below is reported 37 L. T. Rep. N. S. 360, where the pleadings and facts in the case are very fully set out. The facts of the case, however, sufficiently appear from the above statement of the pleadings, and from the judgments which follow.

*Cole*, Q.C. and *Bullen* for defendants, appellants.—In addition to the arguments urged by them in the court below, they distinguished *Cuddington v. Wilkins* (1 Hob. 67) on the ground that, in that case, there had been no conviction, and also subsequently a general pardon, which had a different operation to a special pardon: (*Sir Henry Fine's case*, Godbolt, 288.) In this case the statute 9 Geo. 4, c. 32, s. 3 (a) was equivalent, at most, to a special pardon. The definition of a "felon" in all the dictionaries seems to be the same, viz., "One who has committed a felony."

*Collins*, Q.C. (*Pitt Lewis* with him), for the plaintiff, had proceeded but a very short way in his argument when, on saying he

(a) 9 Geo. 4, c. 32, s. 3.—And whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged: Be it therefore enacted, that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the Great Seal as to the felony whereof the offender was so convicted: Provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony.

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was content to rest his case on the second libel, he was stopped by the court, which delivered the following judgments :—

BRAMWELL, L.J.—I am of opinion that this appeal must fail; and I come to that opinion on a careful investigation of the allegations contained in the alleged libels, and of the way they are dealt with in the pleadings. I am aware that may seem a very narrow ground on which to arrive at a conclusion, and I do not myself like to decide a question on what looks like mere technicalities, but if I do so, it is not my fault; the law is technical. Now the reason I come to this opinion is because I cannot agree with Lord Blackburn that the whole alleged libel (whether it was rightly for the judge or the jury) merely amounted to a statement that the plaintiff had been convicted of a felony, and meant nothing more. If that was all it meant, I should agree with him that the justification was made out. But to come to that conclusion, it is clear Lord Blackburn could not have had his notice attracted to the second allegation in plaintiff's statement of claim—the alleged libel of the 1st day of May—where the plaintiff is called "a felon editor." Now how does the matter stand before us? As to all the facts that it was on the plaintiff to make out, he has done so. The allegation that the statements were "false" it was not necessary that he should specifically make out for this purpose; nor the allegation of damage in paragraph 8 of his claim. The defendants, on the other hand, fail to make out all they must make out before they can win; in the fourth paragraph of the defence they allege, by way of showing the truth of their allegation, that "the plaintiff has been convicted of felony, and was sentenced to twelve months' hard labour." The plaintiff in his reply, paragraph 3, admits; but defendants have not alleged, and plaintiff consequently has not admitted—nay expressly guarded himself from admitting—that the plaintiff was actually guilty of the felony. Therefore, so far as it is necessary to decide the issues of fact, plaintiff is entitled to have them found for him. Now as to the issues in law, how do they stand? Paragraph 4 of plaintiff's reply contains his demurrer, which demurs to paragraph 4 of the statement of defence. As to the first alleged libel, perhaps the demurrer means that it is no justification of a libel which says of a man that he is a convicted felon, to show merely that he was at some time past convicted of felony. But if that is all the demurrer means, then, as to that portion of the libel, I am inclined to the opinion it does not show enough, and should fail. But as to the other portion of the libel, that of the 1st of May, I think it is not met by the defence, and as to it at any rate the demurrer is good. The words are "felon editor." Before defendants can justify the words "felon editor" they must show that plaintiff actually committed a felony; to show merely a conviction on a charge of felony is not enough. I was of that opinion in the course of the argument, and I find authority for it in Taylor on Evidence, 6th edit. sect. 1505: "It

has been determined that a judgment in a criminal prosecution—unless admissible as evidence in the nature of reputation—cannot be received in a civil action to establish the truth of the facts on which it was rendered. That is, such a conviction is no evidence of the commission of a felony in a civil suit like this, and, being “*res inter alios acta*,” is not admissible. All the dictionaries, too, that have been cited support this view; therefore it is no sufficient justification of such a libel to show merely conviction. And on the broad ground of good policy, too, it is desirable to come to this conclusion; for, if a man will bring charges of this sort against others, he should be required to fully prove them; and it should always be open to a man, so attacked, to show his innocence, if he can. As to this portion of the libel, therefore, plaintiff’s demurrer is clearly good. Then, there is defendants’ demurrer. The plaintiff says he has been convicted, it is true, but he has endured the punishment; and to that defendants demur. I am of opinion that defendants fail on that demurrer too; but that part of the libel having been wisely abandoned by Mr. Collins, it is of no importance to consider whether I am right in that opinion. As yet, it will be seen, I have not said a word on the question whether, where a man is called a felon, and he owns that he was prosecuted and convicted on a charge of felony, but says he has suffered the punishment awarded him, he can rightly say, “I was a felon, but am one no longer.” On that point, I myself express no opinion at all, as it seems to me to be in the present case, as I view it, unnecessary to do so. If one were to consider it, there would be a good deal to be said on either side. On the one hand, there is the great desirability that a man, who has been unfortunate or unhappy enough to commit a criminal offence of this sort, should, at some time or other, be so far freed from the stigma and disgrace which inevitably follow on such an act as to make it an offence in others wantonly to cast the fact in his teeth; but then, again, on the other hand, it certainly cannot entirely be put out of sight that a part of a man’s natural punishment is the future opprobrium consequent on his guilt. However that may be, this, at least, is certain, that lightly and for personal reasons to publish such a charge of another man, whether it be true or false, is an act of gross and unwarranted cruelty. I do not say that was the case here. I do not know whether it was so or not, but often it is so; and, where it is, I should be glad if it could be punished.

BRETT, L.J.—There are two things here for our consideration, the rule for a new trial, and the demurrers; and, as they require different treatment, they must not be confused. Now, on the rule for a new trial, I think the point which Bramwell, L.J. has not decided did arise, and that therefore we must consider and decide it. Now, it is clear that this case was not tried at all by Lord Blackburn; he said he knew all the facts, and if a jury were sworn he should direct them to find a verdict for the defendants.

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But if a jury had been sworn, and the facts proved as we must take them to stand upon the pleadings before us now, he would have had no right to direct the jury to find such a verdict. What are the facts? The libels set out in the pleadings are published. It is undeniable that their meaning is a question for the jury; but Lord Blackburn, in effect, says: "Whatever they may find their meaning to be, I shall still direct a verdict for the defendants." Therefore, to test the learned judge's right to so direct them, we must take the extreme possible finding of the jury. Now, the jury might find the first libel to mean, "is a convicted felon now," and not merely that plaintiff was one at some past time. And if they had found so, then the same question would have arisen on this libel as on the second; for, on that certainly they might have found very easily that a "felon editor" implied plaintiff was a felon then, at the time the libel was published. Then supposing the jury to have found so, on both libels, how does it stand? The plaintiff does not and could not dispute the conviction. I assume the facts most strongly against the plaintiff; I assume he was rightly convicted, in all probability it was so. But still I am of opinion that, even on these facts, the plea would show no justification, if the punishment had been proved to have been served. After that, the man was no longer a "felon," and he would have an action against whomsoever called him one. For that proposition there is distinct authority. I think *Cuddington v. Wilkins* (Hob. Rep. 81) is good law, and is distinctly an authority for saying that a pardon, granted to a man who has committed a felony, purges him subsequently of the character of a felon. And the reason is good—it is founded on public policy, which will do all in its power to disfavour men who choose to commit such wicked and malignant acts as these. *Searle v. Williams* (Hob. Rep. 293) is also an authority for the same proposition; and so is Hawkins' Pleas of the Crown (bk. 2, c. 37, s. 48), and a most direct authority. And, if any were wanting, public policy would be an ample ground for upholding those decisions. And since the passing of the Act of 9 Geo. 4, c. 32, the case is much stronger against the defendants. It is not true that that Act was passed merely for the purpose of effecting some alterations in the law of evidence; it was drawn up, I have no doubt at all, with these very authorities full and immediately in view, and amounted to a deliberate adoption of that view of the law by the Legislature. I say it was the deliberate intention of the Legislature when it passed that Act, to put a stop to these unwarrantable acts, and to debar men from continuing to crucify fellows in this unjustifiable manner. It was felt that such acts were abhorrent to justice and totally opposed to any view of the policy of peace. On the second libel, at all events, this is clear; and so far from the judge being entitled to direct a verdict for the defendants on it, it would have been his duty, in my opinion, if the jury had found it to mean what I am supposing they would have found it to mean, to have directed them to find



a verdict for the plaintiff. Then as to the demurrers. As to them I must first say that they are both bad, as being against the spirit, if not the letter, of the Judicature Acts. Demurrers are now an idle waste of time, and if warranted in any shape, it is only when they are in the largest and most general form, and demur to the whole of the opponent's case. But if these demurrers are to be considered, we must take the facts as the jury might have found them—*i.e.*, we must take the libels to mean now a felon. But even if they should be taken to mean merely that plaintiff had been a felon, still the defence is bad, since it does not allege guilt in fact. But if the libels mean "at present a felon," the defence must be bad, because it does not allege that the past felony was not since purged. To be a good defence it should have gone on to add, "and plaintiff is now undergoing the punishment for the same," or to say that the plaintiff had not undergone the punishment awarded. Therefore, even technically on the demurrers, we must find for the plaintiff. I agree most fully with Cleasby, B., that public policy is all against people who make such unjustifiable statements as these; but, in doing so, I wish to guard myself against being supposed to say there is anything which should prevent inquiry into a man's past conduct and character on a proper and justifiable occasion. There are many such, and in those cases, both in motive and reason, the inquiry is justifiable. But people who will rake up all that is against a man in his past history, for their private purposes, and to gratify personal or professional spite, have nothing whatever to be said on their behalf.

COTTON, L.J.—I am of the same opinion. The first question is, as to whether there should be a new trial. Now it is clear what occurred at the trial. Lord Blackburn, when the case was called on, informed plaintiff's counsel that he knew all the facts, and that if a jury were to be sworn he should still direct a verdict for the defendants; and that being so, and there being, moreover, no jury to be got that evening, plaintiff's counsel determined on not incurring the delay and expense of waiting for a jury and having them sworn. But it is not the case that the learned judge was both judge and jury in deciding the matter; he never tried it at all. Therefore the question arises, if there had been a trial before a jury, would the learned judge have been right in so directing the jury? Clearly in my opinion he would not. "Libel or no libel" is a question for the jury, except in the case where it is impossible that the words used should amount to a libel. If that could be said of the first libel here, certainly it could not be said of the second; therefore clearly on that ground there ought to be a new trial. For myself, I should be inclined to say that the first libel meant that the plaintiff had been, at some time previous, convicted of felony; and therefore, on that point, I should be inclined to differ from the court below; but I am clear that the second libel might mean—if indeed it can be read otherwise than meaning—

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that the plaintiff was then, at the time the libel was published, a felon. That being so, the question arises, what is the effect of a punishment undergone, or a pardon granted? We must refer to the Act of 9 Geo. 4, c. 32, s. 3, which has been cited. It begins by reciting that "it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies," &c., from which recital it is clear that the section was not passed solely to affect the law of evidence in certain cases, but to affect also the "civil rights" of persons in the position of the plaintiff here. Therefore, notwithstanding its primary object being alien to the plaintiff's case, the Act does entitle the plaintiff, in my opinion, to say, "Having suffered my punishment I am in all respects as though pardoned"; i.e. (on the authority of the passage in Hawkins and the other authorities cited), "I am an entirely new man, and you cannot justify a libel that calls me a felon." The arguments to be derived from considerations of public policy strengthen this view. A man should not make these statements unless he is under the obligation of some duty public or private to do so, and in such case he is fully protected as the law at present stands. In other cases he deserves no protection. As to the demurrers, I entirely concur with what Brett, L.J., has said as to the present procedure with regard to demurrers. There should be no demurrer except to the whole pleadings, and to the entire action; otherwise a demurrer does no good, but only embarrasses. They ought only to be used where the entire question can be so decided.

*Rule for new trial made absolute. Judgment for plaintiff on demurrer. Appeal dismissed with costs.*

Solicitors for the plaintiff, *Coode, Kingdon, and Cotton*, agents for *John Daw and Son*, Exeter.

Solicitors for the defendants, *Surr, Gribble, and Bunton*, agents for *J. W. Wilson*, Plymouth.

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## NORTH WALES CIRCUIT.

## CARNARVON SPRING ASSIZES.

(Before Mr. Justice MELLOR.)

REG. v. PETER WILLIAMS. (a)

*Night poaching—Offensive weapons—Intention—9 Geo. 4, c. 69 s. 9.*

*Three men in company were seen hunting game in the night time with dogs.*

*It was not proved that two of the men were in any way armed.*

*The third (the prisoner), who was lame, only carried the stick with which he usually walked.*

*The jury should not find the prisoner guilty unless satisfied that this walking stick was an offensive weapon and that the prisoner had carried it with the intention of using it as an offensive weapon should occasion arise.*

THE indictment charged that Peter Williams, together with divers other persons to the number of three and more together on the 22nd day of October, 1877, about the hour of eleven in the night of the same day, being then by night as aforesaid armed with bludgeons, sticks and other offensive weapons, did then together, by night as aforesaid, and armed as aforesaid, unlawfully enter certain land in the occupation of John Jones, situate in the township of L., in the county of Carnarvon, for the purpose therein of taking and destroying game and rabbits, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

2nd count.—That the said Peter Williams, with divers other persons to the number of three and more together, on the day and year aforesaid, about the hour of eleven in the night of the same day, being then by night as aforesaid respectively armed with bludgeons, sticks, and other offensive weapons, were then together by night as aforesaid, and armed as aforesaid, unlawfully in certain land in the occupation of the said John Jones, situate in the township aforesaid, in the county aforesaid,

(a) Reported by C. HIGGINS, Esq., Barrister-at-Law.

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for the purpose therein of taking and destroying game and rabbits, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

There were also counts for resisting his lawful apprehension, and for a common assault.

Evidence was given at the trial that the prisoner, in company with two other men, was seen to come from a field in the occupation of John Jones into the road, where the gamekeeper was watching. After crossing the road the three men with the same two dogs were seen apparently in search of game.

Two of the men escaped, but the prisoner was collared by the gamekeeper and a struggle ensued in the wood. It was given in evidence by the defence that the prisoner was lame and was accustomed to walk with a stick. On the night of the alleged poaching affray, the prisoner was armed only with the stick with which he usually walked, and there was no evidence that the other men were armed at all. The gamekeeper was armed with a similar walking-stick.

*Ignatius Williams* appeared for the prosecution; and the prisoner was defended by *Swetenham*.

It was contended for the defence that there was no evidence that would justify the jury in coming to the conclusion that the prisoner was armed with an offensive weapon, or that he took it with him for the purpose of offence.

MELLOR, J. in charging the jury said: It is provided by the 9th section of the 9 Geo. 4, c. 69, that if any persons to the number of three or more together shall by night unlawfully enter or be in any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanour. In order to bring the prisoner within this statute you must be satisfied, first, that three or more men entered upon land for the purpose of taking game. Now of course, if the keeper is to be relied upon, there can be no doubt about that in this case. He saw three persons and two dogs and saw them beating the field just as people do who go out for the purpose of catching hares or anything else they can get. The only point made by Mr. Swetenham for the defence was this—the prisoner was not armed with any bludgeon or offensive weapon, but with a stick, which he ordinarily used in walking and therefore we cannot assume he took that stick out on that particular night for the purpose of hunting game in these fields. You see that everything depends upon the wording of the Act of Parliament. Suppose the men had nothing but nets with them, that would not be within the statute. There is the stick before you, judge for yourselves, for there is no doubt that it is the stick of the prisoner. With regard to the statute, it seems to have been the opinion—a rather varying opinion—of the Judges,

that it may be a question for the jury whether or not they think the stick is of a character to be called a bludgeon, or an offensive weapon in the nature of a bludgeon, so that it is carried for the purpose of assisting in the poaching, or, if occasion arises, of resisting a lawful apprehension. If you think the prisoner was using this stick and intended it, not for the mere purpose of assisting him in walking, but took it for the purpose of assisting in the infraction of the game laws, then he will have to be found guilty. On the other hand, if you think he only used it as a walking stick and had no intention to use it for offensive purposes, you ought to acquit him. Referring to the count for common assault, his Lordship said—If you think the man used more violence than was necessary to free himself from being laid hold of by the collar, you must find him guilty; but if only force enough to prevent himself from being collared and taken by the game-keeper, he must be acquitted.

*The jury found the prisoner not guilty.*

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## HIGH COURT OF JUSTICE.

### COMMON PLEAS DIVISION.

*Jan. 29 and 30, 1878.*

(Before COLERIDGE, C.J., and LOPES, J.)

USILL v. HALES; SAME v. BREABLEY; SAME v. CLARKE. (a)

*Libel—Privilege—Report of judicial proceedings—Ex parte application dismissed—Want of jurisdiction.*

*An ex parte application was made to a police magistrate in open court, by certain persons who had been employed by the plaintiff upon a railway, for a summons against the plaintiff under the Masters and Servants Act, 1867 (30 & 31 Vict. c. 141), on the allegation that he had not paid them their wages, though he had received funds to enable him to do so. The magistrate refused to grant their application, on the ground that the facts as stated by them did not bring the case within the jurisdiction to do so and afforded no ground for criminal proceedings.*

(a) Reported by J. A. FOOTE, Esq., Barrister-at-law

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*The defendants, who were newspaper proprietors, published a fair report of the proceedings before the magistrate, which contained matter defamatory to the plaintiff.*

*Held, that the defendants were protected by the privilege which attaches to all fair and impartial reports of judicial proceedings, and that such privilege was not taken away either by the fact that the magistrate decided that he had no jurisdiction, or that the application was made ex parte.*

**A**CTION for libel, brought against the proprietors of a newspaper (the *Daily News*) for the publication of certain matter defamatory to the plaintiff.

Two other actions, brought by the same plaintiff against the proprietors of the *Standard* and *Morning Advertiser* were by agreement argued at the same time.

The defamatory matter complained of was contained in a report of an application to a London police magistrate, which had appeared in the three publications. The application was for a summons under the Masters and Servants Act, 1867 (30 & 31 Vict. c. 141), to compel the plaintiff to pay certain wages alleged to be due to the applicants, who had been employed by him upon an Irish railway. The applicants stated that the plaintiff, their employer, had himself received payment from the contractor, and complained of his conduct in withholding from them what they had earned. The magistrate, after hearing the facts, refused to grant their application on the ground that the facts afforded no ground for criminal proceedings.

The action was tried before Lord Coleridge, C.J., at Westminster, and the jury found that the report was a fair and impartial one of what took place. The judge ruled that the report, if fair, was privileged, and the plaintiff obtained a rule *nisi* for a new trial on the ground of misdirection.

The *Solicitor-General* (Sir H. Giffard), for all the defendants (with him *Bremner*, for Hales, *Yelverton* for Brearley, and *Arthur Child* for Clarke), showed cause.—The report in question was found to be fair, and was therefore privileged. The fact that the application was *ex parte* is immaterial; there is no distinction between an *ex parte* application to a magistrate and one to the highest court in the kingdom. Nor is a report of an application the less privileged because that application was refused, since any application to a judge sitting in public may be reported. If the magistrate chooses he may hear it in private, and the case no doubt would be different if that had been done. The only two grounds upon which it has been sought of late years to attack the privilege of publication are either that the publication has passed beyond mere report into comment, or that judicial proceedings have been reported before their termination. The last limitation is not established, but there is some authority in support of it when actual injury has been sustained. Here the proceedings had terminated in the magistrate's dismissing the application,

and the reporter added no comment at all. All that he did, in the words of Lord Campbell, was to "widen the area of the court." He cited: (*Currie v. Walters*, 1 B. & P., 525; *R. v. Wright*, 8 T. R. 297; *Lewis v. Levy*, E. B. & E. 537; *Duncan v. Thwaites*, 3 B. & C. 556; *Wason v. Walters*, 17 L. T. Rep. N. S. 356; L. Rep. 4 Q. B. 73.)

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Serjt. *Ballantine* in support of the rule.—No case has been cited where privilege has been extended to the report of an *ex parte* application which was dismissed, and where one side only was heard. Such a publication is injurious to the individual, and in no way beneficial to the public. Further, the application here was one which the judge had not jurisdiction to act upon, and he dismissed it upon that ground. Counsel's statement is in itself privileged, but a report which gave the statement of counsel without the evidence would not be; and *à fortiori* privilege cannot be claimed for the report of a statement made *ex parte* by an unprofessional and unlicensed person. *Currie v. Walters* (*ubi sup.*) is distinguishable.

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*Shortt* on the same side.—First, this was not a judicial proceeding at all, because there was no jurisdiction to entertain it. That cannot be called a hearing, where no evidence was gone into. No case has yet extended the privilege further than *Lewis v. Levy* (E. B. & E. 537), and there the charge had been investigated under oath before it was dismissed. [Lord COLERIDGE, C.J., referred to *Buckley v. Wood*, 4 Co. 14; *Lake v. King*, 1 Saund. 131.] Secondly, this was a report of an *ex parte* application. Reports of applications for criminal informations have been held privileged, but there are three points of difference between such cases and the present. Applications for criminal informations are rightly made to the proper court, which this was not; they are made upon affidavit, whereas the statements reported here were not supported by oath; and they can only be made by counsel, who may be supposed to act under a sense of responsibility. No case has been produced where the privilege has been held to cover a report of an *ex parte* application not upon oath to a court that had no jurisdiction in the matter. He cited also *R. v. Wright* (8 T. Rep. 297); *Mason v. Pritchard* (2 Camp. 436); *Davison v. Duncan* (7 E. & B. 232).

Lord COLERIDGE, C.J.—I am of opinion that this rule should be discharged. This was an action against a newspaper for a *bona fide* and fair report of a proceeding before a magistrate. Three persons, who had been employed by a civil engineer upon an Irish railway, and who had heard that this civil engineer had been paid whilst they themselves, as they said, had not been paid by their superior officer, the plaintiff in the action, went before a police magistrate in London; and I must take it for the purpose of my judgment that they applied to him for a summons under the Masters and Servants Act. That means that, if there had been materials at the hearing upon which the magistrate thought that the case had been made out, he would have had jurisdiction

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to issue that summons. Supposing that the complainants had, in his opinion, substantiated their complaint, in that event he would have had jurisdiction to issue an order under the Masters and Workmen Act (30 & 31 Vict. c. 141). In the result, however, he thought that the facts stated by the complainant showed that there was no ground either for summonses against the complainant, or for an answer under the Masters and Workmen Act; and it turned out, therefore, in the result that, in a certain sense, the application had been made to him with regard to matters in which he had no jurisdiction. But it has long been held, and most properly held, that it is not the result but the nature of the application made to a magistrate which founds his jurisdiction, and that whenever there is an application made to a magistrate as to a matter over which he has jurisdiction, he has then jurisdiction for the purpose of ascertaining whether the facts make out the case for the exercise of that jurisdiction. The distinction between the cases where there is an inherent want of jurisdiction on account of the nature of the complaint, and where there is what may be called want of jurisdiction because the facts do not make out the charge, is very well explained in the case of *Reg. v. Bolton* (1 Q. B. 66), which is founded on the decision of *Brittain v. Kennaird* (1 B. & B. 432), and the judgment of Richardson, J., in that case. Therefore, in this matter I must take it that the magistrate had jurisdiction to enter upon the inquiry. What therefore was done during this inquiry, upon which the magistrate had jurisdiction to enter, can only be described as a judicial proceeding. It was a proceeding before a judge who, so far as the jurisdiction went, had jurisdiction to conduct it. That seems clear both upon principle and upon authority. If so, this is *primâ facie* a privileged publication, because it is found to be a fair and *bonâ fide* report of a judicial proceeding, and it is too late now to dispute whether the rule of privilege does or does not extend to the publication of such proceedings. It has been laid down again and again in broad terms that the publication of proceedings in a court of justice are privileged if the report of such proceedings be fair and honest; and the report in this case has been found to be so. An attempt has been made, however, to distinguish this case, and to take it out of the general proposition by bringing it within an undoubted qualification that has been granted upon the general rule. It is contended that this is what may be called a report of an *ex parte* or preliminary proceeding. Now there is no doubt that, in the cases which have been referred to by the plaintiff's counsel, the term *ex parte* proceeding has been over and over again used by judges of great eminence: sometimes affirmatively, in saying that an *ex parte* proceeding is not privileged; and sometimes negatively, for example in saying "this being a proceeding not *ex parte* is privileged." I do not doubt, for my own part, that if this argument had been addressed to the court some sixty or seventy years ago, it might have met



with a different result from that which it is about to meet with to-day. That the cases cited in support of it have made a certain impression upon our minds it is useless to deny. It seems to me in vain to say that, in the judgments of the great judges referred to, we do not find a rule laid down that an *ex parte* or preliminary proceeding is not privileged; and upon this ground, good or bad, that it is very hard on an individual to have a matter which was stated against him behind his back, with no means of answering it, reported in the public papers, while his answer is not similarly reported. There are strong observations in the case of *Duncan v. Thwaites* (*ubi sup.*), which no doubt go far towards establishing that proposition. There is also a dictum of one of the greatest legal authorities reported. Lord Eldon in that case said that every lawyer would be startled by the proposition that a report of an *ex parte* application was privileged; and undoubtedly there have been few greater lawyers than Lord Eldon. But we are not now living, so to speak, within the shadows of these cases; and it is idle to deny that in cases decided since that time learned judges have come to conclusions which it is not for me to say are inconsistent, but which at least appear to my mind irreconcilable with these earlier decisions. I find some excellent good sense in the judgment in the Court of Queen's Bench in the case of *Wason v. Walters*, and there is a passage in it which I should desire to adopt. It is said that, whatever disadvantage might attach to a system of unwritten law, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the various conditions of society and to the habits of the age in which we live, so as to avoid the inconsistencies which might otherwise arise. In this way only the law of libel has gradually developed itself into anything like a settled form, and I entirely concur in the opinion there expressed. It is well known that, in important cases, *ex parte* proceedings are published day by day, especially in some particular cases of inquiry which would be excluded from privilege according to the rule proposed. It is well known that in the course of inquiries before coroners cases are reported from day to day in the newspapers, and it is unheard of that an action should be brought by persons affected by such reports, if they are *bonâ fide*. That seems to introduce this element into the determination of these cases, that there is a certain elasticity in the rules which are to be applied to the question of privilege—development is perhaps the more correct word to employ—and courts have from time to time applied, as best they might, that which they think to be the good sense of the rules which exist to cases which have not been positively decided to have come within them. If there had been a case directly in point with the present—a case in which the proceedings had begun and terminated with an *ex parte* application, and where the jury had found that the report of the proceedings was *bonâ fide*, honest, and fair—if there had been a case similar

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to this in which the report had been held not to be privileged, I do not hesitate to say, for my own part, that I would gladly have acted upon such a case; for I do not disguise that my own judgment is not at all satisfied with the alleged enormous advantage to the public from these small cases being published from day to day, although they inflict pain upon individuals; nor do I see the extreme good resulting which is supposed to justify them. But it is, of course, the duty of the judge, nevertheless, to declare the law not in accordance with what he thinks it ought to be, but as it is; and if he finds a rule established and laid down, it is far better that he should accept and apply it judicially and honestly, even if he is not satisfied to his own mind with the application of that rule. Therefore I come to the consideration of this case, feeling that the general tendency of the law has been of late years to hold such publications as this as privileged. I do find one case which to the best of my judgment appears to cover the present one; and that is the case to which much reference has been made—the case of *Lewis v. Levy* (*ubi sup.*). I do not propose to take up time by reading the whole of this judgment, or anything like it; but I find that what was held to be entitled to privilege there was this—the publication of a fair and correct report of proceedings taking place in a public court of justice; and it was accepted as a part of the rule that the privilege extended to proceedings taking place publicly before a magistrate, on the preliminary investigation of a criminal charge, terminating in the discharge of the person charged. I am perfectly aware that there may be a distinction—a subtle distinction, a distinction which I will not say is a mere shadowy distinction, but a subtle distinction—between the case before us and the case of *Lewis v. Levy*. But I cannot disguise from myself that the argument by which the Court of Queen's Bench was led in that case, the *ratio decidendi* upon which the court acted, covered the present case. This is a case, as I have already explained, in which there was a judicial proceeding terminating not in the discharge of the party charged, but in the refusal of the magistrate to grant a summons against the person charged, on the ground that such a proceeding was not warranted by the facts disclosed. I think, therefore, resting my judgment upon this case, and upon *Ourrie v. Walter* (*ubi sup.*), the principles of which it adopts, that these rules must be discharged.

LOPES, J.—In this case three men, who believed themselves aggrieved by the conduct of the plaintiff in respect of the payment of their wages, applied to a magistrate in open court for a summons under the Masters and Servants Act, and the magistrate refused the application, considering it a matter for a civil and not a criminal court. The defendants afterward published a report which the jury have found was a fair report of what occurred. On principles of public convenience the ordinary rule is that no action can be maintained in respect of a fair and



impartial report of a judicial proceeding, though the report contain matter of a defamatory kind and injurious to individuals. It was argued that the matter in respect of which the application was made was not within the jurisdiction of the magistrate. But the cases are clear to show that want of jurisdiction will not take away the privilege if it is maintainable on other grounds. Nor do I think the privilege is confined to the Superior Courts. It is not the tribunal, but the nature of the alleged judicial proceedings, which must be looked at. The point mainly relied on by the defendants was, that the application to the magistrate was *ex parte*, and as such could not be privileged. Had the matter before the magistrate been in the nature of a preliminary inquiry, and if the ultimate judicial determination was to remain in abeyance until a further investigation, I should have thought there was authority at any rate for the defendants' contention, though how far these authorities might be followed in the present day I think doubtful; but the matter of the application was finally disposed of by the magistrate, and I can find no case where a fair report of a judicial proceeding finally dealing with the matter in open court has been held libellous. There are authorities which, until they are carefully examined, would seem to support the contention that an *ex parte* proceeding in court is not privileged; but, so far as I can ascertain, these are the cases where the proceeding was preliminary, and where there was no final determination at the time of the alleged libellous report. On the other hand *Currie v. Walters* and *Lewis v. Levy* (*ubi sup.*) are strong authorities in favour of the report in this case being protected. I am of opinion, therefore, that these rules must be discharged.

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*Rules discharged.*

Solicitors for the plaintiff, *Carr, Fulton, and Carr.*  
Solicitors for the defendant *Hales, Ashurst, Morris, and Co.*  
Solicitor for the defendant *Brearley, James Goren.*  
Solicitors for the defendant *Clarke, H. J. and T. Child.*

## COURT OF APPEAL.


*Jan. 29, 30, 31, and Feb. 12.*

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

REG. v. CHARLES BRADLAUGH AND ANNIE BESANT.(a)

*Obscene libel—Indictment—Omission to set out the words of the libel—Arrest of judgment.**An indictment for publishing an obscene book, which does not set out the passage or passages of such book alleged to constitute the offence, but only refers to the book by its title, is bad, and the defect is not cured by verdict.*

THE defendants had been tried in the Court of Queen's Bench (into which court the indictment had been removed by *certiorari*), on an indictment which charged them with "unlawfully and wickedly devising, contriving, and intending, as much as in them lay, to vitiate and corrupt the morals as well of youth as of divers other subjects of the Queen, and to incite and encourage the said subjects to indecent, obscene, unnatural, and immoral practices, and bring them to a state of wickedness, lewdness, and debauchery, unlawfully, &c., did print, publish, sell, and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book, called 'Fruits of Philosophy,' thereby contaminating, &c." The jury found that the book was calculated to deprave public morals, but exonerated the defendants from all corrupt motive in publishing it.

Judgment was deferred to a subsequent day, in order that the defendants might move the Court of Queen's Bench to quash the indictment or to arrest judgment, which they accordingly did, on the ground that, in an indictment for this offence, the words said to constitute the libel ought to have been set out. The Court of Queen's Bench, however (consisting of Cockburn, C.J. , Mellor, J.), decided against the defendants, and judgment was entered, and sentence passed. The case below is reported in L. Rep. 2 Q. B. Div. 569.

The defendants now brought error, assigning several grounds, the only material one, in view of the judgment, being the same as

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

that on which they moved the Court of Queen's Bench, namely, that in an indictment for an offence consisting of words, the words themselves, alleged to constitute the offence, must be set out.

Jan. 29, 30, 31.—The defendants, Charles Bradlaugh and Annie Besant, in person.—There is a mass of authority for saying that, where the alleged offence consists of words, the words ought to appear in the indictment. Many of them are collected in Archbold's *Crim. Pl.*, p. 57, 18th edit. *Zenobio v. Axtell* (6 T. R. 162) was a civil case; but the rule is the same in criminal cases: (*Hunter's Case*, 2 Leach, 631.) In that case, too, there had been verdict, and yet judgment was arrested. That was a case of forgery, and was before the statute of 2 & 3 Will. 4, c. 123, by which such necessity was removed in cases of that offence. *Rex v. Mason* (2 T. R. 581) was a similar case of false pretences, and was not overruled by *Reg. v. Goldsmith* (28 L. T. Rep. 881; L. Rep. 2 C. C. R. 74). The same was held in a case of seditious libel: (*Rex v. Horne*, 20 St. Tr. 793.) Archbold's *Crim. Pl.* 805, 806, 18th edit., states what it is necessary to set out. In *Wright v. Clements* (3 B. & Ald. 503) judgment was arrested on this ground. (*Rex v. Sparling* (1 Strange, 498) and *Rex v. Popplewell* (2 Strange, 685) were cases of swearing and cursing, and there it was held that the oaths used must be set out. So in *Reg. v. Howe* (1 Strange, 699), where the indictment was for speaking scandalous and contemptuous words of a magistrate in the execution of his office: (Russell on Crimes, 5th edit. vol. 3, p. 219, citing *R. v. Sacheverell*, 15 How St. Tr. 466; and *Tabart v. Tipper*, 1 Camp. 352.) In *Sacheverell's* case the opinion of the judges, ten in number, which is in favour of the defendants here, was not overruled by the House of Lords before whom Sacheverell was impeached by the Commons; the House did not feel bound by it only because, whatever might be the rule in a court of law, by the law and usage of Parliament no such rule was recognised, and that was not a prosecution in a court of law but an impeachment. The opinion of the judges in *Sacheverell's* case is quoted by Lord Ellenborough in *Cook v. Cox* (8 M. & Sel. 110) and recognised by him as an authority. The note in *Sacheverell's* case, at p. 467, saying that in *Layer's* case (16 How St. Tr. at p. 317 "the judges without any doubt held this opinion" (of the judges in *Sacheverell's* case) "to be wrong" is not justified. Eyre, J., it is true, is surprised at it, having thought it was enough if a libel appear by its sense or in substance. Even if that were enough it has not been done here. In *Rex v. Orull* (17 How St. Tr. ; 2 Strange, 789), also a case of obscene libel, all the words were set out. Also in Starkie on Libel, 4th edit., by Folkard, p. 699, it is said that "the libellous matter must be set out in the indictment." There is all this authority in our favour, and no English decision against us. But some American cases will be cited for the prosecution. In *Commonwealth v. Holmes* (17 Mass. Rep. 335) the libel was not set out, it is true; but,

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at any rate, there was a count excusing such omission, and giving a reason for it. *Commonwealth v. Tarbox* (55 Mass. Rep. 66) is in my favour, for there it was held insufficient to paste the libel on to the indictment. But American cases cannot be used as authority, as they do not proceed on English common law, but on the law as contained in the American revised statutes. *Commonwealth v. Sharples* (2 Serj. & Rawle, Pennsylv. Rep. 91) was a case of a picture, and is not therefore in point. *Reg. v. Goldsmith* (28 L. T. Rep. N. S. 881; L. Rep. 2 C. C. R. 74; 22 L. J. 94, M. C.), is not against us; Bovill, C.J.'s judgment is expressly in our favour. That was a case of false pretences, an offence which is regulated by statute. In *Sill v. The Queen* (22 L. J. 41, M. C.), also a case of false pretences, it was held a fatal defect to omit to state on the indictment whose property the money obtained by false pretences was. In *Hearne v. Stowell* (12 A. & E. 719) judgment was arrested for a defect in a declaration, which caused the connection between the alleged libel and the plaintiff to fail. These cases plainly show the common law rule, which has been altered in some cases by statute, but not in this case. This is not a mere formal defect, but a substantial one, and fully justifies the rule which has made it fatal.

Sir H. S. Giffard (S.G.) and Mead for the Crown.—This defect in the indictment, if it is one, is aided by verdict, for the jury have found the allegation in the indictment, as to the nature and character of this book, to be true. *Sacheverell's case* (15 How. St. T. 566), though not conclusive one way or the other, shows, at any rate, that it is only a question of practice. The test of what defects verdict will cure is in the answer to the question, Is it an allegation which, though so imperfect and insufficient as that it might be bad on demurrer, is nevertheless proved, and must have been proved, in its particularity, before verdict could have been given thereon? Then, if verdict had been given, the defect must be held to have been cured: *Heyman v. The Queen* (28 L. T. Rep. N. S. 162; L. Rep. 8 Q. B. 102, per Blackburn, J.); *Pippet v. Hearn* (5 B. & Ald. 634); *Reg. v. Aspinall* (36 L. T. Rep. N. S. 297; L. Rep. 2 Q. B. Div. at p. 57); *Reg. v. Goldsmith* (28 L. T. Rep. N. S. 881; L. Rep. 2 C. C. R. 74), which overruled *Rex v. Mason* (2 T. R. 581). In *Sill v. The Queen* (22 L. J. 41, M. C.), it was owing to the statute requiring the ownership of the money to be shown that the omission of an allegation stating whose it was was not cured by verdict. In murder, it is true, you must be more particular, but that is by reason of the peculiarity of the offence. Each case depends on its own circumstances. There is less necessity for such a rule now than there was when most of the cases cited were decided; for now, since Fox's Act (32 Geo. 3. c. 60), libel or no libel is not a question for the judge but for the jury. All that can be for the judge is to say that it cannot possibly be a libel. How much must be set out, and what is merely

a formal and what a substantial defect, are only questions of degree. 14 & 15 Vict. c. 100, s. 25, gave a full power of amendment in the case of mere formal defects, provided only that objections to such defects should be taken before the jury were sworn. The book being designated under a *videlicet* makes no difference. It is a material allegation, and no other libel could have been proved under this indictment. And evidence is admissible to identify a thing named on the indictment, as always had to be done where the indictment named the instrument with which the mischief of which the prisoner was accused was done. And there is no hardship suffered by the defendants. If they lose the power of taking the opinion of a court as to whether the indictment shows any obscene libel to have been published, they get an equivalent, and substantially the same, ground of demurrer in the omission. *Laver's case* (16 How St. Tr. 93) has destroyed the authority of the opinion of the judges, not acted on, in *Sacheverell's case* (15 How St. Tr. 467). In *Dugdale's case* (Dear & P. C. C. 64) there was a similar omission to this, and yet no objection to the indictment on that ground was taken by counsel, nor was such omission noticed by Lord Campbell, who presided. In *Reg. v. Aspinall* (36 L. T. Rep. N. S. 297; L. Rep. 2 Q. B. Div. 59) the indictment merely amounted to "you conspired to defraud," and yet it was held enough. What distinction can be drawn between conspiracy and this offence for this purpose? The conspiracy was the offence there, so here is the publishing. The court should be careful not to sacrifice substance to form; the jury have seen the book, and have found it an obscene libel. In *Reg. v. Perrott* (2 M. & Sel. 376) the indictment contained no allegation that the pretence was false, and therefore was defective, even after verdict; for a verdict of guilty only means guilty of the premises in the indictment contained. In *Reg. v. Knight* (37 L. T. Rep. N. S. 801) there was no allegation of defendant's bankruptcy, although it was necessary, but the defect was held to be cured by verdict. In *Tarbox's case* (55 Mass. Rep. 66) the libel was affected to be set out, but being done in an irregular mode, viz., by pasting on to the indictment, the indictment was held bad. Having affected to set it out, of course they should have done so regularly and accurately.

*Mead* with him.—The word libel is used in a different sense in obscene, to what it is in defamatory and other libels, and implies a different class of offence altogether. Therefore it may well be that what would be necessary in an indictment for defamatory libel would not be so in one for an obscene libel. The gist of this offence is that it is *contra bonos mores*; it is not a libel in the ordinary sense: (*Reg. v. Ourll*, 2 Strange, 783.) In Archbold's Crim. Pl. p. 314 (18th edit.) is given a precedent for a similar offence which, throughout, does not contain the words "libel" or "publish" but only "sell and utter." A similar precedent occurs in Chitty's Crim. L. vol. 2, p. 46, a book of great authority. That there is some distinction between

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this and other libels appears also from the fact that an obscene libel is capable of being tried at quarter sessions, whereas other libels were removed by 5 & 6 Vict. c. 38 from its jurisdiction. The courts will also excuse the setting out of words when they are so obscene that it is undesirable they should be perpetuated on the record. The American decisions cited by the defendants (*Commonwealth v. Holmes*, 17 Mass. Rep. 335; *Commonwealth v. Sharples*, 2 Serjt. & Rawl. 91; and *Commonwealth v. Tarbox*, 55 Mass. Rep. 66) show that that is the law in America; and they are authorities here, as American criminal law is founded on our common law. There is some small English authority, too, in a precedent in Chitty's Crim. L. p. 45, where the libel is alleged to be "in terms or expressions not fit or proper to be named or mentioned in any language, or in any court of justice." It is true there is no such express allegation in this indictment, but the epithets employed are peculiarly strong, and amount to such an allegation by implication.

The defendants in reply.—There is no such distinction as has been contended for between obscene libel and any other. The definition of libel in Russell on Crimes, vol. 3, p. 177, is broad enough to cover all. A blasphemous libel, at any rate, is within the same class of offence, and in *R. v. Williams* (26 How St. Tr. 653), which was a blasphemous libel, the words were set out. In Archbold's Crim. Pl. 814, the precedent immediately before the one read by Mr. Mead was exactly of this sort, and there the words are set out, and the word libel is used. So also in Starkie on Libel, by Folkard, p. 773, form 35. *Wilkes's case* (4 Burr. 2527) was an obscene libel, and the words were set out. In *Curl's case* (2 Strange, 789) the discussion on the word libel was merely as to the jurisdiction of spiritual or temporal courts. In that case, too, the words were set out. If the word libel is removed from this indictment, no offence is charged. Fox's Act made no such alteration in the law as is contended; it gave additional protection to defendants. *Reg. v. Aspinall* (36 L. T. Rep. N. S. 297; L. Rep. 2 Q. B. Div. 57) is in our favour.

*Cur. adv. vult.*

Feb. 12.—BRAMWELL, L.J.—The question we have to decide is a purely technical one: it is a pure question of law, and does not affect the merits of the defendants' case in the least. It arises in this way. The defendants were indicted for that they "did print, publish, sell, and utter a certain indecent, lewd, filthy, bawdy, and obscene book called 'Fruits of Philosophy,'" and were tried and found guilty. They thereupon moved the Court of Queen's Bench to quash the indictment, and also in arrest of judgment. That rule was refused them, and they now come before us to ask us to say that the Court of Queen's Bench was wrong in that decision. The objection taken to the indictment is that it states that an offence has been committed, but does not



show what that offence is—it does not show, on the face of it, what the offence is that is said to have been committed; and, on the other side, it seems to be allowed that this objection would have been a good one if taken on demurrer, but it is said, it is now taken too late, and is a bad objection in arrest of judgment. Now, the general rule on the subject is clear and beyond all doubt, and by it the indictment must show, on the face of it, the particular offence committed, and how it was committed. That is the general rule at common law, and this case rests wholly on common law principles, no statute being applicable to it. For instance, in an indictment for murder, it is not enough to say a man is indicted “for that he committed murder,” or “for that he murdered A. B.” So in the case of burglary, it will not do to allege merely that the man committed burglary, but you must set out that the prisoner did, at such and such a time, on a certain day, “break and enter the dwelling-house of A. B.,” &c. And there are three reasons given for requiring this particularity, two of which are perhaps unimportant at this day, but the third of which is still a substantial reason. The first reason was that the defendant might know what precise charge he had to meet; the second, that, in the absence of this particularity, it might become difficult afterwards to prove of what precise offence the defendant had been convicted or acquitted, as the case might be. At the present day, perhaps, these reasons have little weight, as it rarely could happen that there was any real doubt as to the offence the defendant was charged with. But the third reason is even now a substantial one. The third reason for requiring particularity was in order that the defendant might have an opportunity of taking the opinion of a court, either on demurrer, or in arrest of judgment, as to whether the offence he was charged with was an offence at all, or constituted any ground for an indictment. And it was, and is, reasonable that a defendant should have such an opportunity of challenging the indictment, and it is therefore reasonable to require that the indictment shall set out the specific offence which is charged. It follows, therefore, that where the offence consists in words, written or spoken, the words themselves must be stated and set out; and that, where they are not set out, the indictment is on that account defective. So in an indictment for perjury, it has always been held necessary to set out the particular words which are said to constitute the offence: (Chitty’s Crim. Law, p. 309.) So also in the case of forgery, it is necessary that the forged document be set out: (Chitty’s Crim. Law, p. 1040.) Now, how does it stand in the case of libel? In defamatory libel there can be no doubt that it was necessary, and it seems almost to be conceded that, in that case, it still would be necessary, that the words should be set out so that the court might be enabled to tell whether they could be, or indeed whether they were, a libel. To show that that was the law *Cook v. Cox* (3 M. & S. 110) is a clear authority. Lord Ellenborough, in

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delivering judgment in that case, says: "A motion has been made in arrest of judgment, on an objection to the last count. . . . The objection is, that in a count for slander by words, the words themselves should be set out, in order that the defendant may know the certainty of the charge, and may be able to shape his defence. . . . The weight of authorities is against the setting out words by their effect only." And then he cites a number of cases in support of that proposition, and goes on to say that "there seems to be no reason for any difference in this respect between civil and criminal cases; the action arises *ex delicto*." Certainly, if there were any difference, it would not be that greater laxity was permitted in criminal than is permitted in civil cases. He concludes by saying: "If, however, the authorities cited are law, and they are supported by more ancient ones, it is of the substance of a charge of slander that the words themselves be set out with sufficient inuendoes;" and judgment was accordingly arrested. That was the opinion of Lord Ellenborough in a case of slander, and it is recognised as good law in the case of *Solomon v. Lawson* (8 Q. B. 823). The head-note of that case says that, "where a declaration for libel sets out a publication which refers to a previous publication, but unless by reference to the language of such previous publication contains no libel, such previous publication must be considered as incorporated in the publication complained of and must appear in the declaration to be set out *verbatim* and not merely in substance." These were both civil actions it is true; but undoubtedly, as is remarked over and over again in the judgments in these and similar cases, there is no difference in this respect between civil and criminal pleading; and if there were a difference, as I have already said, it would be that greater strictness which would be required in criminal cases. These two cases then are clear authority for the necessity of setting out the words themselves in defamatory libel, and whatever reason exists for requiring that they should be set out in that case exists also for the same necessity in this. It has been argued that "libel" has a different signification in this and some other cases from what it has in the case of defamatory libel, and it is said that there is no case of a blasphemous or obscene libel where judgment has been arrested for not setting out the words constituting the offence. I certainly do not know of any such case, but neither do I know of one in which it has been held that they need not be set out; and reason suggests that it is as necessary in these as in any other libels. At any rate in *R. v. Ourll* (17 How. St. Tr. 154; 2 Strange, 789), which was a case of an obscene libel, the words were set out; and in *R. v. Sparling* (1 Strange, 498) it was held a fatal defect in an indictment for cursing and swearing that the oaths themselves were not set out so as to appear on the face of it. Then another reason is given why an obscene libel should not be set out *verbatim* in the indictment. The records of the court, it is said, ought to

be kept pure and undefiled. This seems to me a wholly fanciful and imaginary *desideratum*. And if such an objection is good in the case of an obscene libel, why is it not equally good, or even better, in that of a blasphemous libel, or an indictment for the use of seditious language? And why is it not also an objection in the case of a libel defamatory of private character? There, if anywhere, it seems to me, it should prevail. What can be more inconvenient and grievous, for instance, than the perpetuation and publication, by means of the record of the court, of a libel charging a man with the commission of an infamous crime? Therefore, the objection is a fanciful one; but it is said to be supported by authority. The only English authority quoted is a precedent in Chitty (Chitty Crim. Law, vol. 2, p. 45); but a solitary precedent in a text book is of but little weight: you must have a mass of precedents before they can be used as authority. The other authorities consist altogether of American cases. Now cases decided by the American courts are not, strictly speaking, authorities at all; they are only guides, though frequently most valuable guides; they contain the opinions of able men, well versed in our law, and therefore will always have great weight attached to them in our courts, but they are not authority by which we are in any way bound. But even if they were binding on us, they do not assist the case of the prosecution in any way, but make quite in the opposite direction. For instance, the case of *The Commonwealth v. Tarbox* (55 Mass. Rep. 66) has been relied on; but in that case there was an allegation in the indictment that the libel was so obscene it could not be put on the record, and it is clear that it was considered that, but for such an allegation, the words must have been set out. And the other American cases go no further to help the prosecution, but, as far as they go, equally aid the defendants' case. It is true that it is suggested in this case that, although there is no such specific allegation in the indictment, yet that one is implied in the epithets "lewd, filthy, bawdy, and obscene" applied to the libel; but as such epithets are employed in every indictment, they can imply nothing of the sort. This, then, is the state of the law down to recent times, certainly down to 1846, when *Solomon v. Lawson* (8 Q. B. 823) was decided. What is it that we are asked to do? We are not asked to say that the law has been altered, but we are asked to say nothing less than that all these cases are wrong, and all these judges have been mistaken as to the law from the beginning to the end. *Cook v. Cox* (3 M. & Sel. 110) we are to say was wrongly decided, and the statute of 23 Geo. 2, c. 11, altering the law in respect of perjury, was passed wholly without any necessity. And this we are invited to do on no other ground but that certain indictments in cases of false pretences do not set out the false pretences employed. Now I do not intend to go into these cases; I do not for a moment suggest they were not rightly decided; in a similar case I should feel myself bound by them. But in those cases the courts have held,

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not that there was a failure to state a necessary ingredient, but that there was merely an imperfect statement which was cured by verdict. That is clear from the case of *Heyman v. The Queen*, where Blackburn, J. uses the words “imperfectly stated” in pointing out the rule as to what sort of defect verdict will cure. So, also, in *Reg. v. Goldsmith*. In the report of my judgment in that case in the *Law Journal*, there is an evident error. On p. 98 I am reported to have said: “It is not impossible that if the false pretences used,” &c.; it is plain that the word “not” ought to have been omitted. But these cases, whether right or wrong—and I think they were quite right—are for this purpose immaterial and irrelevant. It is impossible that the judges who decided them could have meant to overrule what was long and well-established law. They could not, because they ought not, and had no such power. Therefore the law remains as decided on the authorities that, in such a case as this, the words themselves must be set out, or the indictment will be bad on demurrer, or on motion in arrest of judgment. Now I come to consider the judgment of the court below: (L. Rep. 2 Q. B. Div. 569.) The Lord Chief Justice gives three reasons for his decision. The first reason is the great inconvenience that might arise from such a rule. He gives an instance of “what would be the monstrous inconvenience of setting out *in extenso* the whole of a publication which may consist of two or three volumes.” With great deference to his Lordship’s opinion, it seems to me equal inconvenience might arise from making such an exception to the general rule of law. For when is a libel to be considered too long to be set out? Is one of ten volumes too long, or two, or one, or one of one hundred pages? Where is the line to be drawn? And it has not been suggested that a defamatory libel need not be set out, and yet it may be of any length. And however long a libel is, it is admitted that it must be set out, or, on demurrer, at any rate, the indictment will be bad. Then his Lordship says the objection ought to have been taken on demurrer. That might be so if the Legislature had said so, but it has not, and it is not the law of the land. The law says, convenient or inconvenient, he may take the objection at any time, before or after verdict. His last ground is that it is *commune nocumentum*, and therefore, after verdict, need not have been set out; but I am not aware of any such exception being known to the law. Now, in the judgment delivered by Mellor, J., I find he says, “if it be essential to set forth the terms in which the libel was published, the point may still be taken upon error.” I am glad to find those words, and glad also to see that the Lord Chief Justice himself says that he “leaves the ultimate decision of this matter to the court of error.” I am glad to find those expressions, because they show that they did not consider they had concluded the whole question, but that it was deserving of being more fully discussed here. The result is that there are a number of authorities, unimpeached and binding upon us, and no good reason having been

given us why we ought not to do so, we must act upon them. According to the law as contained in them, this indictment is wholly defective, and not merely imperfect, the words "to wit," with what follows them, not supplying the defect in any way, being mere words of identification. Therefore, without expressing any opinion on the merits, which it is not for us to do, and which we could not do, being wholly in ignorance on the matter, we come to the decision, on the dry point of law, that judgment ought to have been arrested, and the judgment of the Queen's Bench Division must be reversed.

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BRETT, L.J.—I am of the same opinion. In the first place I would remark that we are not called upon in this case to differ from any mature judgment of the court below. It is plain they had formed no strong opinion on this point which is now before us. And they had not the materials before them for forming such an opinion; for the authorities were not brought before them as they have been brought before us. The only cases the prosecution brought to their attention were the American cases and *Dugdale's case* (Dear & Pearce's C. C. 64), which, I think, is clearly not in point. On demurrer, they were prepared to have held the indictment would have been bad; we say it was so bad that verdict did not cure it. Now, there are three questions which arise for our consideration: first, what is it necessary to set out in such an indictment as this? secondly, what kind of omission can be cured by verdict? and, thirdly, is this such an omission? Now, the first question I cannot answer better than in the words of my judgment in *Reg. v. Aspinall*, which was a case carefully and laboriously considered. There it is said: "Every pleading, civil or criminal, must contain allegations of the existence of all the facts necessary to support the charge or defence set up by such pleading. An indictment must, therefore, contain an allegation of every fact necessary to constitute the criminal charge preferred by it. As in order to make acts criminal they must always be done with a criminal mind, the existence of that criminality of mind must always be alleged. If, in order to support the charge, it is necessary to show that certain acts have been committed, it is necessary to allege that those acts were in fact committed;" and then the judgment goes on to enumerate other ingredients of an indictment which are necessary in certain cases. Where, therefore, the charge is of a crime which consists in words, written or spoken, it follows from that that the words themselves must be set out; and in all libels, whether obscene, blasphemous, seditious, or defamatory, the words used are the crime. It is quite unnecessary to inquire whether the term libel is properly applied to obscene or blasphemous publications; I am aware that in Sir James Stephen's valuable Digest of the Criminal Law these offences are not classed under the head of libel at all; but for this purpose it is wholly immaterial to consider that question; it is clear that the offence consists in the words used. Other cases in which

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words constitute the crime are perjury, false pretences, forgery, sending threatening letters, and administering unlawful oaths. In every one of these cases there is authority for saying that the words must be set out, unless a statute expressly dispenses with such a necessity. Every such statute is an express authority for the proposition that, but for it, the words must have been set out. The earliest case bearing on this point is the case of *Rex v. Sparling* (1 Strange, 498). The defendant was there indicted "for that he did, within ten days last past, profanely swear fifty-four oaths, and profanely curse one hundred and sixty curses, *contra formam statuti*," and was convicted, but, the report says, "the court held the conviction naught for another exemption, that the oaths and curses were not set forth; for what is a profane oath or curse is a matter of law;" and the conviction was quashed. So in *Rex v. Popplewell* (2 Strange, 685) the same decision was come to, in a similar case, on similar grounds. So also in *Rex v. Ohaveney* (2 Raymond Rep. 1368). In all these cases there had been conviction; therefore they are express authorities, and go the whole length of this case. Then, in the case of the offence of sending threatening letters, *Lloyd's case* (East Pl. C. 1122) is an authority to show that the letter must be set out, or a conviction obtained on such a defective indictment will be held bad. Yates, J. is there reported to have stated, "that he had caused inquiries to be made into the practice of the Old Bailey, and upon the Western and Home Circuits, and found that, in all indictments upon that Act of Parliament, the letter itself was generally set forth; and that the clerks did not remember an instance where the indictment did not state at least the substance of the letter." Then, in false pretences, *R. v. Mason* (2 T. R. 581) is an authority. Mellor, J. seems, in *Heyman v. The Queen*, to have thought that that case had been overruled, but I cannot find that that is the case; on the contrary, I find it constantly approved of and acted upon. Mason was indicted "for that he unlawfully, &c., did obtain from one Robert Scofield divers sums of money, that is to say, the sum of two guineas, of the proper moneys of the said Robert Scofield, by false pretences, with an intent," &c. He was convicted and sentenced to transportation for seven years, when he brought a writ of error, on which the court ordered the judgment to be set aside. Buller, J. says: "Several objections have been made on the part of the defendant; but the material one, on which I found my judgment, is that the indictment does not state what the false pretences were." And Grose, J. says that, in his opinion, "the objection that the pretences are not specified is decisive. This is a charge for a precise crime, and therefore it must be alleged." There, after others have been enumerated, the fundamental reason for the rule is given, that the words are the crime, and must therefore be alleged. In *Rex v. Perrott* (2 M. & Sel. 379), also a case of false pretences, the actual question was a different one. The defect in the indictment there



was that it did not specifically negative the truth of the alleged false pretences, but the grounds of Lord Ellenborough's judgment apply equally to this case. "Every indictment," he says, "ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him." The cases of perjury I do not intend to cite, as the statute (23 Geo. 2, c. 11) enacting that "henceforth in every indictment for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendants" is decisive to show that, but for it, that would not have been sufficient. *Hunters' case* (2 Leach C. C. 624) is an authority in the case of forgery. In that case, the forged document was a receipt, which was not however totally omitted from the indictment, but was so defectively set out that, in Grose, J.'s words, "there was nothing to show that the instrument, which did not on the face of it import to be a receipt, was in fact a receipt, or was intended to be a receipt, or could have the operation of a receipt." It is clear from that judgment that the learned judge considered this omission to amount to an omission of the offence charged, and the indictment to be bad on that ground. *R. v. Mason* (2 T. R. 581) he cites with approval. Administering unlawful oaths is an offence regulated by statute. There are two statutes with respect to it, 37 Geo. 3, c. 123, and 52 Geo. 3, c. 104. Sect. 4 of the former statute, and sect. 5 of the latter, enact that, in indictments for this offence, it shall not thenceforth be necessary "to set forth the words of such oath or engagement, and that it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof;" clearly showing, that but for such a provision it would have been necessary to set forth the oath in full. Then I come to defamatory libels and slanders. *Newton v. Stubbs* (3 Mod. 71; 2 Show. 435) was an action, not an indictment. The declaration set out the slander in Latin, and not, as it was spoken, in English; and it was objected that the words used were not set out. The Court held the objection good, even after verdict, and judgment was arrested. In *Zenobio v. Axtell* (6 T. Rep. 162) the libel was in French, but the indictment, after saying that it was published in the French language, went on to say that it was "to the purport and effect following in the English language, that is to say," and then followed a translation of the libel in English. It was held, on motion in arrest of judgment, that such a declaration was defective, Lord Kenyon remarking that "the plaintiff should have set out the original words, and then have translated them." In *Wright v. Clements* (3 B. & Ald. 503) the declaration alleged that the defendant published certain libellous matters of and concerning the plaintiff, "in substance as follows: that is to say," and then set out the very words of the libel. On motion in arrest of judgment it was argued that, from some such a preface to the setting out of the libel, it must be concluded that the actual libel published was not set out *verbatim*,

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but in substance only; and the Court allowed the objection, saying the libel ought to have been introduced by some such words as “to the tenor and effect following,” which would have imported that the very libel itself was set out; and judgment was accordingly arrested. *Cook v. Cox* (3 M. & Sel. 110) is to the same effect. These cases were decided in 1814 and 1820, and therefore after Fox’s Libel Act (32 Geo. 3, c. 60), passed in 1792, which is a sufficient answer to the argument founded on that Act. But it is quite clear that no alteration was or was intended to be made in the law in this respect by that Act. This appears both from the principle of that enactment, and also from express provision contained in it. After that Act it was still left for the judge to say whether the words used could possibly be a libel, and therefore, since before he can decide that question he must have the libel before him, the necessity for setting out the libel was not removed. But the Act contains an express provision to the same effect. By sect. 4 it is provided, “That in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this Act; anything herein contained to the contrary notwithstanding.” The last case that I shall refer to is a very remarkable one. In *Rex v. Wilkes* (4 Burr. 2527) the defendant was indicted for having published an obscene and impious libel, “to the purport and effect following, to wit:” and then followed the libel. Before the trial, the Attorney-General, Sir Fletcher Norton, applied to Lord Mansfield at chambers to amend the indictment by striking out the above words, and substituting for them the words “to the tenor and effect following, to wit;” which his Lordship, after hearing the other side against it, did. Now here it is worthy of notice that, although the actual libel was fully set out, yet the highest law officer of the Crown thought it inexpedient and unsafe to go on without substituting technical prefatory words, which were always held to signify that the actual words of the libel followed them, for other words which had not the same technical significance. So, taking a review of all these cases, we find in them a strong body of authority, derived from every kind of crime which consists in words, to the effect that in all such crimes the pleadings must set out the words themselves which constitute the offence. Now what are the cases which are said to be to the contrary effect? In *Dugdale v. The Queen* (Dear & P. 64) the indictment was for keeping in his possession indecent prints, and, in a second count, for obtaining and procuring indecent prints, in both cases with an intent to publish them. In neither case were the prints set out in the indictment, but it was not necessary, on such a charge, that they should be set out. The offence was complete though the defendant should never have looked at them, and therefore it was not necessary to the validity of such an indictment that they should



appear on the face of it. This case is therefore distinguishable on that ground; but I think it would have been enough to say that there is a difference, in this respect, between indecent prints and pictures, and an offence consisting of words. *Sedley's case* (1 Keb. Rep. 620; Fortescue, 99) is also distinguishable on the same ground, that it was not a case of libel at all, but of indecent exposure. In *Reg. v. Goldsmith* (28 L. T. Rep. N. S. 881; L. Rep. 2 C. C. R. 74) the prisoner was indicted for unlawfully receiving goods knowing them to have been obtained by false pretences, he did not get them himself by false pretences. Now, on such a charge, it was not necessary to prove that the prisoner knew what false pretences had been used in getting the goods, therefore it was not necessary to set out the actual false pretences in the indictment; just as, in an indictment for receiving goods knowing them to have been stolen, it is not necessary to show how or by whom they were stolen, since that offence can be committed by a man who is ignorant of the exact circumstances of the theft. *Heyman v. The Queen* was a case of conspiracy fraudulently to remove goods in contemplation of bankruptcy, and, as in *Reg. v. Aspinall*, which was also a case of conspiracy, the offence was held complete directly the agreement was come to, so that—after verdict at least—an indictment which alleged such an agreement, but omitted other particulars, was good. In those cases the crime did not consist in words, but in an agreement for a particular purpose. Then as to the last question, how far the omission must go to be incurable by verdict. The rule as to this point also is stated in my judgment in *Reg. v. Aspinall*. After stating the test for determining what is a mere imperfect averment—which the verdict will cure—to be to see if, “assuming the facts which are accurately alleged in the indictment to have been proved as alleged, and the facts which are imperfectly alleged to have been proved in a sense adverse to the accused, the charge is supported,” the judgment goes on to give the test of an omission which verdict will not cure: “But if, assuming both the above-mentioned allegations of facts, the perfect and imperfect allegations, to be proved respectively as before stated, the charge would not be supported for want of the existence of some other allegation, affirmative or negative, which has been totally omitted, then the indictment is bad notwithstanding the verdict. The verdict is only to be taken as conclusive evidence that the facts alleged in the indictment, accurately and inaccurately, were proved in a sense adverse to the accused. If those facts, so proved, would not support the charge, the indictment is bad on a writ of error;” and the passage from Williams’ *Saunders* (vol. i., p. 261, edit. 1871) is to the same effect. The indictment must contain all that is put in issue; what is totally omitted is not in issue, whereas an inaccurate or defective averment is, and verdict accordingly cures the defect. Now is there such a total omission here? The introductory words, “a certain indecent, lewd, filthy, bawdy, and

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obscene libel," merely point out the class of offence under which the words which are to follow come. But all that follows is, "to wit, a certain indecent book called 'Fruits of Philosophy.' " There is no description even of the contents of the book, and a total omission of all quotation, and, according to the authorities I have examined, such an omission is fatal. Some American cases have been cited; but they do not help the prosecution, for they either are not the law of England, or, if they are they are in the defendants' favour. They seem to say that where there is an averment that the libel is so bad as to pollute the records of the court if set out upon it, the libel need not be set out. But here there is no such averment. Even if there had been such an averment, I know no authority for saying that that is the law of England. It seems a more robust doctrine to say there is nothing in such an objection, when everyone that is in court during the trial hears the obscenity over and over again. Therefore, in my opinion, this indictment is incurably defective, and the defendants are on that short ground, one entirely of law and quite apart from the merits of their case, entitled to our judgment.

COTTON, L.J.—I am of the same opinion. Though merely one of criminal pleading, this is an important question, since it is most desirable that there should be certainty in our criminal law. Now the rule on this point, as to what it is necessary to set out in an indictment for a libel, is perhaps best stated by Lord Ellenborough in *Cook v. Cox* (3 M. & Sel. 110), which has been already frequently referred to. That rule was established a long time ago; it has been constantly and uniformly recognised since, as appears from the string of cases referred to by my brother Brett, and no case going in the opposite direction has been cited by the counsel for the prosecution. The only case at all of that character was *Dugdale's case* (Dear & P. C. C. 64), but that case was not really in point. Therefore the rule must be taken to be well and firmly established, and that being so, it is scarcely necessary to consider the reason of it. But one good and sufficient reason it is easy to see, viz., that the defendant may be able, by demurrer, to raise the question whether the indictment charges any offence at all. We must not look at the injustice or inconvenience of any particular case; here is a rule existing, and it is our duty to adhere to it. The court below plainly were not aware of these English cases laying down and confirming this rule. None of them were brought to their attention, American cases alone being cited. But do these American cases even justify such an omission as there is here? We should not be bound by them if they did, but they do not. They lay down a rule that, where there is an allegation that the libel is too bad to be put on the record, it may be omitted; and it is enough to say that there is no such allegation here. But do the English courts recognise that rule? They do not. Our courts do not allow libels to be perpetuated and disseminated under a pretence of judicial necessity, but that is as far as they

go. Where it is relevant and necessary, there is no rule which allows matter to be omitted merely because it is impure or libellous. A court ought not to consider its records defiled by any matter which a defendant has a substantial interest in demanding to be placed on them. If it is desirable that there should be an exception in any such case, the Legislature must make it, as it has made exceptions in other cases. Is this omission, then, cured by verdict? The rule is simple; verdict will cure only defective statements. This is not a mere defective statement, there is an absolute and total omission. Such an omission has not been cured, and cannot be cured by verdict; therefore, according to settled and well-established rules of law, the defendants are entitled to our judgment.

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*Judgment reversed.*

Solicitor for the prosecution, *T. J. Nelson.*

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## MIDLAND CIRCUIT.

LEICESTER SPRING ASSIZES.

*March 19, 1878.*

(Before Lord Justice BRAMWELL.)

REG. v. BRADSHAW. (a)

*Manslaughter—Sports—Football—Rules and practice of the game.*

*If, while engaged in a friendly game, one of the players commits an unlawful act whereby death is caused to another, he is guilty of manslaughter.*

*In such a case it is immaterial to consider whether the act which caused the death was in accordance with the rules and practice of the game.*

*The act would be unlawful if the person committing it intended to produce serious injury to another, or if, committing an act which he knows may produce serious injury, he is indifferent and reckless as to the consequences.*

**W**ILLIAM BRADSHAW was indicted for the manslaughter of Herbert Dockerty, at Ashby-de-la-Zouch, on the 28th day of February.

(a) Reported by GILBERT G. KENNEDY, Esq., Barrister-at-Law.

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The deceased met with the injury which caused his death on the occasion of a football match played between the football clubs of Ashby-de-la-Zouche and Coalville, in which the deceased was a player on the Ashby side, and the prisoner was a player on the Coalville side. The game was played according to certain rules known as the "Association Rules." (a) After the game had proceeded about a quarter of an hour, the deceased was "dribbling" the ball along the side of the ground in the direction of the Coalville goal, when he was met by the prisoner, who was running towards him to get the ball from him or prevent its further progress; both players were running at considerable speed; on approaching each other, the deceased kicked the ball beyond the prisoner, and the prisoner, by way of "charging" the deceased, jumped in the air and struck him with his knee in the stomach. The two met, not directly but at an angle, and both fell. The prisoner got up unhurt, but the deceased rose with difficulty and was led from the ground. He died next day, after considerable suffering, the cause of death being a rupture of the intestines.

Witnesses were called from both teams whose evidence differed as to some particulars, those most unfavourable to the prisoner alleging that the ball had been kicked by the deceased and had passed the prisoner before he charged; that the prisoner had therefore no right to charge at the time he did, that the charge was contrary to the rules and practice of the game and made in an unfair manner, with the knees protruding; while those who were more favourable to the prisoner stated that the kick by the deceased and the charge by the prisoner were simultaneous, and that the prisoner had therefore, according to the rules and practice of the game, a right to make the charge, though these witnesses admitted that to charge by jumping with the knee protruding was unfair. One of the umpires of the game stated that in his opinion nothing unfair had been done.

*Etherington Smith* appeared for the prosecution.

*Simms Reeve* for the defence.—The learned council referred to *Reg. v. Young* (10 Cox C. C. 371), quoting from "Roscoe's Digest of the Law of Evidence in Criminal Cases," p. 710, 9th ed.)

BRAMWELL, L.J., in summing up the case to the jury said, "The question for you to decide is whether the death of the deceased was caused by the unlawful act of the prisoner. There is no doubt that the prisoner's act caused the death and the question is whether that act was unlawful. No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another. For instance, no persons

(a) *Etherington Smith*, in opening the case for the prosecution, was proceeding to explain the "Association Rules" to the jury, and to comment upon the fact of whether the prisoner was or was not acting within those rules, when Bramwell, L.J. interposed, saying "whether within the rules or not, the prisoner would be guilty of manslaughter if while committing an unlawful act he caused the death of the deceased."

can by agreement go out to fight with deadly weapons, doing by agreement what the law says shall not be done, and thus shelter themselves from the consequences of their acts. Therefore, in one way you need not concern yourselves with the rules of football. But, on the other hand, if a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But, independent of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful. In either case he would be guilty of a criminal act and you must find him guilty; if you are of a contrary opinion you will acquit him." His Lordship carefully reviewed the evidence, stating that no doubt the game was, in any circumstances, a rough one; but he was unwilling to decry the manly sports of this country, all of which were no doubt attended with more or less danger.

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Verdict, *Not guilty.*

Solicitors for the prosecution, *Smith and Mammatt*, of Ashby-de-la-Zouch.

Solicitor for the defence, *W. Napier Reeve*, of Leicester.

## MIDLAND CIRCUIT.

### NORTHAMPTON SPRING ASSIZES.

*March 18, 1878.*

(Before Lord Justice BRAMWELL.)

REG. v. DRAGE AND OTHERS. (a)

*Receiving stolen goods—Guilty knowledge—Possession of other stolen property—Prevention of Crimes Act (34 & 35 Vict. c. 112, s. 19.)*

*In order to show guilty knowledge, under 34 & 35 Vict. c. 112, s. 19, it is not sufficient merely to prove that "other property stolen within the preceding period of twelve months" had at some time previously been dealt with by the prisoner;*

(a) Reported by GILBERT G. KENNEDY, Esq., Barrister-at-Law.

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*It must be proved that such "other property" was found in the possession of the prisoner at the time when he is found in possession of the property which is the subject of the indictment.*

*Prisoner was indicted for receiving stolen goods. To show guilty knowledge evidence was tendered, under 34 & 35 Vict. c. 112, s. 19, to show that a short time previously the prisoner had sold for half its value and had otherwise disposed of other property stolen within the preceding period of twelve months.*

*Held, that words of the statute, 34 & 35 Vict. c. 112, s. 19, did not extend to such evidence, which was therefore inadmissible.*

THE prisoner was indicted, with others, for receiving goods knowing them to have been stolen. The prosecutor proved that on the night of the 27th November, 1877, the warehouse of Messrs. Mann, of Cogenhoe, was broken into, and a large number of boots, boot tops, and skins stolen therefrom; that on the 22nd day of December the prisoner, Oliver Drage, under the name of Alfred Knight, was finishing a boot, the top of which was one of the tops stolen from Messrs. Mann, and that he gave no account of how the top came into his possession.

The prosecution then, with a view of showing guilty knowledge, under sect. 19 of 34 & 35 Vict. c. 112 (a) called witnesses to prove that, a few weeks before the warehouse of Messrs. Mann was broken into, the premises of Messrs. Evans and Nicholls, of Desborough, were entered and reels of silk and thread to the value of 80*l.* stolen therefrom. That in December, 1877, these same reels were sold by Drage in great quantities at about half their value to the witnesses, and that he handed over to one witness, for work and labour done, a number of the stolen reels instead of a money payment.

In answer to his Lordship, the police stated that none of the reels of silk or thread were found at the premises of the prisoner at the time when he was found finishing the boot, the top of which was part of the subject-matter of the indictment.

Upon this answer being given, *Harris*, on behalf of the prisoner, submitted that the evidence as to the reels was not within the section and must be withdrawn from the jury.

BRAMWELL, L.J.—The evidence is clearly not within the words, whatever may have been the intention of the Legislature.

*A. K. Loyd* (*W. A. Metcalfe* with him) for the prosecution.—The words "there was found in the possession of such person," are not to be read as if they had been "there was discovered in the possession of such person at the time of finding the stolen

(a) This section provides that "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen, which forms the subject of proceedings taken against him."



property the subject of the indictment." [BRAMWELL, L. J.—Who can be said here to have "found" the reels?] Finding the reels in his possession is an equivalent expression to finding him in possession of the reels. Here the witnesses to whom the prisoner sold the reels found him in possession of the reels, in other words, found the reels in his possession. A possession of other property stolen within the previous twelve months is what proves the guilty knowledge, not the "finding" of the reels in the sense of their being discovered upon a search by the police. No time or place for the finding is specified by the section.

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BRAMWELL, L.J.—If counsel had not pressed the admission of this evidence I should have said that no doubt could exist on the point. The words of the section do not extend to the evidence tendered here to prove the guilty knowledge. I am asked to direct the jury that they may take the evidence into consideration and to reserve the point, but as I entertain no doubt I shall tell the jury they are not entitled to consider the question of the reels upon this charge.

Solicitor for the prosecution, *O. O. Becke*, of Northampton.

Solicitor for the defence, *A. J. Jeffery*, of Northampton.

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### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

*Feb. 22 and 23, 1878.*

(Before O'BRIEN, J., and FITZGERALD, J.)

REG. v. McENEANY. (a)

*Practice—Change of venue in cases of felony—Application by prisoner—Prejudice existing among jurors.*

*In a case of murder the venue was changed from the county where the alleged crime was committed to another county, on an affidavit by the prisoner's solicitor that from conversations he had*

(a) Reported by *CECIL R. ROCHE*, Esq., Barrister-at-Law.



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*had with the jurors of the county where the alleged crime was committed, he was convinced a strong prejudice existed against the prisoner, and that an impartial trial could not take place there, even though no abortive trial had taken place in the county where the venue was originally laid. Fitzgerald, J., dissentiente.*

**M**OTION to make absolute a conditional order that a writ of *certiorari* do issue directed to the justices of oyer and terminer and general gaol delivery in and for the North-East Winter Assize County, at the Winter Assizes for the said Winter Assize County, held at Belfast, in the county of Antrim, and to the justices of oyer and terminer and justices of assize in and for the county of Monaghan, to remove into the court here all and singular indictments of whatsoever felonies whereof the said Bryan McEneany is before them indicted, together with all things touching the same, with the view and in order that a suggestion be entered on the roll that a fair and impartial trial cannot be had by a jury of the county of Monaghan, and that it is convenient that the issue be tried before a jury of the county Louth. The affidavit most strongly relied on by the prisoner was that of Mr. Ross his solicitor, after stating that the prisoner had been tried at Belfast at the Winter Assizes for the North-East Circuit, 1877, for the murder of his brother Peter McEneany at Mullinstwinan, in the county Monaghan, on the 19th day of August, 1877, and that the jury disagreed, and the prisoner was sent back for trial to Monaghan, the affidavit thus proceeded: "On the 25th day of August last there appeared in the local paper, viz., *The Northern Standard*, an account of this murder. The article was headed 'another murder near Carrickmacross,' and commenced as follows:—'One of the most cold blooded murders that has taken place in this part of the county during the memory of any living man took place early on the morning of Sunday last.' It continued, 'There is a strong feeling of indignation abroad in the neighbourhood inspired by the aggravated character of the atrocity, and there is some reason to hope that the perpetrator of this sanguinary deed will yet be dragged to justice.' And again, on the 15th day of September last another article appeared in the *Northern Standard* headed, 'The murder at Carrickmacross; serious discovery; painful scene.' It then gave an account of the rumours then in circulation in the county. It also set out the statement made by Michael McEneany (the son of the prisoner) at the magisterial investigation, and says, 'Here a scene ensued, which was at one time painful and interesting. The old man wrang his hands, tore his hair, and jumped in a frantic manner about the court; he asked his son did he want him to be hanged, and was he going to turn traitor; had he ever reared a son to swear away his life.' The account concluded as follows: "The cause that rumour in the neighbourhood assigns for the murder is that the story having

gone abroad that the deceased had signified his intention of making the child of his niece (who was living in the house with him) his heir, the prisoner Bryan, being the next of kin to the deceased, was anxious to have him out of the way before he should have made a will in favour of the child.' ” The deponent then stated his belief that these articles had a prejudicial effect to the prisoner. The deponent stated that he had a conversation with a member of the jury who tried the prisoner at Belfast, and that he told him seven of the jury were in favour of the prisoner. The deponent then proceeded to state his knowledge of large numbers of the jurors of the county Monaghan, and that before the trial at Belfast he was informed by several jurors that they were convinced Bryan McEneany was guilty of the alleged murder and that if they were on the jury he would never have an opportunity of committing another crime. That he was informed at Belfast by some of the more respectable of the Crown witnesses that the excitement in the neighbourhood of the locality where the murder was committed was intense, and that if McEneany were acquitted of the charge he might never return home, as his life would not be worth an hour's purchase in that district. That since the Belfast trial a number of jurors residing in the neighbourhood of Monaghan, viz., from thirty to forty, expressed themselves to the deponent altogether dissatisfied with the trial there, and stated that if they had been upon the jury they would have found the prisoner guilty at once, and would have no hesitation at all in hanging every member of his family. The affidavit then proceeded to state several other instances of a like nature in which jurors had stated that they had formed an adverse opinion to the prisoner. That the jury panel for the county Monaghan is a very limited one, consisting generally of not more than 200 names and invariably some of them are presiding as grand jurors for the county. That a number of them are also publicans whom the Crown Solicitor always directs to stand aside, and a large number of the remainder reside in the Carrickmacross district of the county, where the murder took place. That the deponent knew well the general feeling of the people from the statements made to him by jurors in different parts of the county, and that even if he exercised his right of challenge on behalf of his client to the very fullest extent, he believed an unbiassed jury could not be obtained to try the case in the county Monaghan. The son of the prisoner, Peter McEneany, also deposed to the strong feeling existing in the neighbourhood against the prisoner, and to the fact that certain Crown witnesses refused to travel in the same railway carriage with any of the prisoner's family when on their way to give evidence at the trial at Belfast. The Crown Solicitor and the Sessional Crown Solicitor denied the existence of a widespread feeling against the prisoner in Monaghan. The resident magistrate in Monaghan made a similar statement, and his affidavit contained the following statement, “The said county is large

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and well-populated, and there are in the present year over 677 names on the jurors' book; I believe that by far the greater number of persons on the said book know nothing of the facts of the alleged murder, and have hardly ever heard of it. As the locality where the crime occurred is considerably nearer to Dundalk (the assize town of Louth) than the town of Monaghan, it is much more likely that the jurors who would be empanelled in the former town would have a greater knowledge of the circumstances of the case, and be more subject to local and other influences, than those who would be empanelled in Monaghan."

The *Solicitor-General* (*Fitzgibbon*), with him *Holmes*, Q.C. and *Kisbey* for the Crown, showed cause.—There has not been a sufficient case made out on the affidavits to change the venue. The solicitor for the prisoner has evidently been going about among the jurors trying to extract opinions from them about the case. No doubt a power does exist in the Court to change the venue, but it should not be exercised until an abortive trial has taken place. No such abortive trial has as yet taken place in the county Monaghan. That was the case in *The Queen v. Barrett* (Ir. Rep. 4 C. L. 284; see *Rex v. Holden*, 5 B. & Ad. 347).

*Dodd* (with him *Overend*) for the prisoner, in support of conditional order.—The rule of law upon this subject is thus laid down by *Lefroy*, C.J. in *The Queen v. Conway* (7 Ir. C. L. Rep. 535): "If you find such a state of circumstances upon the facts as shows that a large portion of those persons who are usually called upon the jury for the trial of cases of this sort are placed under circumstances which make it presumable that they will be so affected by prejudice or partiality, or other sufficient causes, as to prevent them giving a fair and impartial verdict, the Court is warranted in removing the place of trial." In *Hunt's case* (3 B. & Ald. 444), the trial was removed to another county: (See *Reg. v. Palmer*, 5 El. & B. 1028.)

O'BRIEN, J.—I cannot disregard the positive statement in Mr. Ross's affidavit, as to the opinions expressed to him. It has been suggested that these expressions are the result of Mr. Ross going about the county asking for them; but that has not been stated in any of the affidavits. Mr. Ross states that on several occasions he was informed by several jurors that they were convinced the man was guilty. He states his conversation with a gentleman, who served on the jury, that I think should not have been put forward. I have no doubt there are a large number of jurors who have a feeling against the prisoner. I do not apprehend this case will be drawn into precedent; if in any case the Crown apprehend a man will not receive a fair trial, that is a ground authorising the Court to change the venue. The Court will decide any other case according to its circumstances.

FITZGERALD, J.—This motion was heard yesterday before my brother O'Brien and me. I think that the cause shown against the order by Mr. Solicitor-General ought to be allowed, but my

brother entertains a different opinion, I willingly yield to his better judgment and greater experience, but at the same time desire to state my views lest the order to be made should be drawn into a precedent. I may state in the outset that we are both of opinion that the trial should not take place at Dundalk, and that the change of venue, if any, should be to Armagh. It was urged in argument that there was no instance of such a change in a capital felony at the instance of the prisoner, but we entertain no doubt as to the authority of the Court, on a proper case being made, and I am prepared to say that our authority should be exercised not less freely in cases of felony than in misdemeanours and more freely for the prisoner than for the prosecutor. I am, however, apprehensive that in making the order we go far to establish a very dangerous precedent, and therefore I state the reasons which would lead me to refuse the writ of *certiorari*. The case made for the prisoner rests entirely on the affidavit of Mr. Ross, his solicitor, and on a few paragraphs only of that affidavit. The other affidavits made to sustain the motion count for nothing. The homicide with which the prisoner is charged is not agrarian, and there is nothing connected with it which would produce any other feeling than that of horror at the crime, and a desire that the perpetrator should be brought to justice. I should hope that such is the view, not only of the people of the locality, but of the whole country. The crime charged against the prisoner is a domestic murder, and it was perpetrated in August, 1877, at Magheraclone, in the angle of the county of Monaghan, projecting between the counties of Cavan and Louth, and at a point distant about two miles from Kingscourt, in Cavan, and this locality is referred to in Mr. Ross's affidavit as "the district," and embraces but a very small and almost isolated part of the county. The cause was sent to be tried at Belfast at the last Winter Assizes, and was tried on the 18th and 19th days of December last, ending in a disagreement and a discharge of the jury. I have now to make some comments on the affidavit of Mr. Ross, but as I am informed he is a very young practitioner I should add, that if he has erred it has been no doubt through excess of zeal for his client's interest. Mr. Ross first tells us that when the jury at Belfast was discharged, he was informed by one of them that seven of their body were for an acquittal. As this allegation could have no bearing on the present motion, the inference is that it was introduced with another view, viz., by giving publicity to it, to affect the next jury who may try the cause. Mr. Ross states in effect, that being a general practitioner in the county of Monaghan, and brought into contract with the jurors of the county, he has from time to time learned from a great number of them that they entertain and have expressed opinions very adverse to the prisoner. I do not go at all into details and desire to avoid them, but the impression conveyed to my mind is that the prisoner's solicitor has been putting himself in communication with numbers of the

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jurors of the county, and elicited from them expressions of opinion adverse to the prisoner to be put forward soon after in an affidavit to change the venue. I need not point out that such a line of proceeding is not within the proper duty of a solicitor, that it is fraught with danger to the administration of justice and nearly approaches, and may lead to, the canvassing of jurors. There is nothing before us to show that the jurors alluded to really entertained the opinion they are represented to have expressed. Again, if the venue is to be changed on evidence so obtained and of such a character, it is unnecessary to point out how easily in other cases following this precedent a foundation may be laid or fabricated for a similar motion. But apart from the consideration I have suggested, the affidavit is not to me satisfactory. It gives no names and presents no statements that can be specifically answered or that can be encountered even by a general direct denial. It is to be observed, too, that almost all the allegations in the affidavit would be satisfied if we suppose that "thirty or forty" of the county jurors coming from the district had expressed the adverse opinion which Mr. Ross describes. The prosecutors have encountered these general allegations in the only way practicable, viz., by the affidavits of the county resident magistrate and of the sessional Crown solicitor, both gentlemen long resident in the county, with special means of information and of great experience in county affairs. From these affidavits I am led to the conclusion that there is no feeling at all in the county other than is produced by a domestic crime of so deep a dye, and that there is no well founded reason to suppose that the prisoner would not receive an impartial trial in the county of Monaghan. The affidavit of Mr. Ross is to me very unsatisfactory. The effect of the order now about to be made will be almost necessarily to postpone the trial to the next Summer Assizes, as we can accept no consent from the prisoner, and do not intend to impose any terms on him. The *certiorari* will probably issue to-day, but there will be, according to established practice, six days for its return. On the return of the indictment here a writ of *habeas corpus* must be sued out to bring up the prisoner, and on his appearance in this court he will be called on to plead *de novo*, then notice of trial must be given, the *nisi prius* record made up, and jury process awarded.

*Venue changed to Armagh.*

## HOUSE OF LORDS.

*March 1 and 4, 1878.*

(Before the LORD CHANCELLOR (Cairns), Lords HATHERLEY,  
PENZANCE, and GORDON.)

CUNDY v. LINDSAY. (a)

*Fraud—Property in goods obtained by fraud—Bonâ fide purchaser. A purchaser of a chattel, who has not purchased in market overt, takes the chattel subject to any infirmity of title in the vendor, even if he purchase bonâ fide without notice.*

*A person of the name of A. Blenkarn wrote to the respondents and ordered goods of them, intentionally signing his name in such a manner as to be mistaken for Blenkiron. There was a respectable firm of that name, and the respondents, believing that they were dealing with that firm, forwarded the goods to Blenkarn. Blenkarn had no means of paying for the goods. The appellants afterwards purchased the goods bonâ fide from Blenkarn.*

*Held (affirming the judgment of the court below), that the property in the goods had never passed from the respondents and that they were entitled to recover the value of them from the appellants.*

*Hardman v. Booth (1 H. & C. 803 ; 7 L. T. Rep. N. S. 638) followed.*

THIS was an appeal from a judgment of the Court of Appeal (Mellish, Brett, and and Amphlett, L.JJ.), reported in 2 Q. B. Div. 96, and 36 L. T. Rep. N.S. 345, reversing a decision of the Queen's Bench Division (Blackburn, Mellor, and Lush, JJ.), reported in 1 Q. B. Div. 348, and 34 L. T. Rep. N. S. 314, in favour of the appellants, who were the defendants below.

The plaintiffs were linen manufacturers at Belfast, and the defendants carried on business in London. The action was brought for the conversion of 250 dozen cambric handkerchiefs. The case was tried before Blackburn, J. and a special jury in November, 1875.

At the trial it appeared that a person named Blenkarn ordered goods in writing from the plaintiff, giving as his address

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.



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“Blenkarn and Co., 37, Wood-street, and 5, Little Love-lane, Cheapside.” There was a very respectable firm of Blenkiron and Sons, carrying on business in Wood-street, whose name was known to the plaintiffs, and they supplied the goods believing that they were dealing with that firm. Blenkarn had no means of paying for the goods, and on the discovery of the fraud he was prosecuted for obtaining goods by false pretences, and was convicted. Before his conviction he had sold some of the goods to the defendants in the ordinary way of business, and the defendants had resold them before the fraud was discovered. It was admitted that they were *bonâ fide* purchasers for value.

The Queen’s Bench Division directed the verdict to be entered for the defendants on the ground that the property in the goods had passed to Blenkarn, and from him to the defendants, but this decision was reversed as above mentioned.

The *Solicitor-General* (Sir H. S. Giffard, Q.C.), *Benjamin*, Q.C., and *B. F. Williams* appeared for the appellants, and argued that there was a distinction between goods obtained by larceny and goods obtained by fraud; in the former case the property does not pass, in the latter it does. Blenkarn was a real person, carrying on his business at the address he gave, and they made the contract with him, and delivered the goods to him with the intention of passing the property, though they mistook him for someone else. (See 2 Russ. on Crimes, 4th edit p. 200, and the cases there cited.) The case of *Reg. v. Middleton* (L. Rep. 2 C. C. R. 38; 28 L. T. Rep. N. S. 777) shows the distinction between false pretences and larceny. See also *Horwood v. Smith* (2 T. Rep. 750), and the recent Act (30 & 31 Vict. c. 35, s. 9), which points in the same direction, as it does not extend the relief given to a *bonâ fide* purchaser in cases of larceny to cases of false pretences, because it is not necessary. The result of the decisions is that a contract obtained by fraud is not void but voidable at the option of the vendor, but until he has exercised that option the fraudulent purchaser may transfer the property to a *bonâ fide* third party. The plaintiffs parted with the title and the property, which passed to Blenkarn, and they intended to do so; a man is bound by his own intention even in a case of fraud. In giving possession they gave a title as well: (see *Pease v. Gloaher*, L. Rep. 1 P. C. 219; 15 L. T. Rep. N. S. 6; citing *Kingsford v. Merry*, 11 Ex. 577.)

*Wills*, Q.C. and *Fullarton*, for the respondents, supported the judgment of the Court of Appeal, and contended that no contract had been entered into at all, so that no title could be given to the defendants.

The *Solicitor-General* replied.

March 4.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Cairns).—My Lords, you have in this case to discharge a duty which is always a disagreeable one for any Court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the conse-



quences of a fraud practised upon both of them must fall. In discharging that duty your Lordships can do no more than apply rigorously the settled and well-known rules of law. With regard to the title to personal property, those rules may, I take it, be thus expressed: By the law of our country the purchaser of a chattel takes the chattel as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner, then the purchaser will obtain a good title, even though afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it and to set it aside, because those circumstances will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced. The question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property from Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even though, as I have said, it might afterwards be open to a process of reduction upon the ground of fraud, still in the meantime Blenkarn might have conveyed a good title for valuable consideration to the present appellants. Now there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods passed, it could only pass by way of contract, there is nothing else which could have passed the property. The second observation is this, your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever, as to conversations or as to acts done; the whole history of the transaction lies upon paper. The principal parties concerned, the respondents and Blenkarn, never came in contact personally; everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case. Now, discharging that duty, and answering that inquiry what the jurors have found in substance is this: they have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by

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the way in which he left uncorrected the mode and form in which in turn he was addressed by the respondents, that by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well-known and solvent house of Blenkiron and Sons, doing business in the same street. Those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case. If that is so, what is the consequence? It is that Blenkarn was acting here just in the same way as if he had forged the signature of Blenkiron and Sons to the applications for goods, and as if, when in return the goods were forwarded, and letters were sent accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods and of the letters which were addressed to, and intended for, not himself, but the firm of Blenkiron and Sons. Now, stating the matter, shortly in that way, I ask the question, is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn? Of him they knew nothing, and of him they never thought, with him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement, or to any contract whatever. As between him and them there was merely the one side to a contract where, in order to produce a contract, two sides would be required. With the firm of Blenkiron and Sons of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure. The result, therefore, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case, namely, in which the contract never comes into existence. That being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which it was attempted to give to the appellants was a title which could not be given to them. I therefore move your Lordships, that this appeal be dismissed with costs, and the judgment of the Court of Appeal be affirmed.

LORD HATHERLEY.—My Lords, I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the woolsack. The real question we have to consider here is this, whether or not any contract was actually entered into between the respondents and a person named Alfred Blenkarn, who imposed upon them in the manner described by the verdict of the jury; the case that was tried being one as between the alleged vendors and a person who had purchased

from Alfred Blenkarn. Now the case is simply this, as put by the learned judge in the court below; it was most carefully stated, as we might expect it would be by that learned judge: "Is it made out to your satisfaction that Alfred Blenkarn, with a fraudulent intent to induce customers generally, and Mr. Thomson in particular, to give him the credit of the good character which belonged to William Blenkiron and Sons, wrote those letters in the way you have heard, and had those invoices headed as you have heard? and further than that, did he actually by that fraud induce Mr. Thomson to send the goods to 37, Wood-street?" Both these questions were answered in the affirmative by the jury. What then was the result? It was, that there were letters written by a man endeavouring by contrivance and fraud, as appears upon the face of the letters themselves, to obtain the credit of the well-known firm of Blenkiron and Sons, Wood-street. That was done by a falsification of the signature of the Blenkirons, writing his own name in such a manner as that it appeared to represent the signature of that firm. And, further, his letters and invoices were headed "Wood-street," which was not an accurate way of heading them, for he occupied only a room on a third floor, looking into Little Love-lane on one side, and into Wood-street on the other. He headed them in that way in order that by these two devices he might represent himself to the respondents as Blenkiron of Wood-street. He did that purposely; and it is found that he induced the respondents by that device to send the goods to Blenkiron of Wood-street. I apprehend, therefore, that if there could be said to have been any sale at all, it failed for want of a purchaser. The sale, if made out upon such a transaction as this, would have been a sale to the Blenkirons, of Wood-street, if they had chosen to adopt it, and to no other person whatever; not to this Alfred Blenkarn, with whom the respondents had not, and with whom they did not wish to have, any dealings whatever. It appears to me that this brings the case completely within the authority of *Hardman v. Booth* (1 H. & C. 803; 7 L. T. Rep. N. S. 638), where it was held that there was no real contract between the parties by whom the goods were delivered and the concoctor of the fraud who obtained possession of them, because they were not sold to him. Exactly in the same way here, there was no real contract whatever with Alfred Blenkarn; no goods had been delivered to anybody except for the purpose of transferring the property to Blenkiron (not Blenkarn); therefore the case really in substance is the identical case of *Hardman v. Booth* over again. My attention has been called to another case which seems to have been decided on exactly the same principle as *Hardman v. Booth*, and it is worth while referring to it as an additional authority upon that principle of law. It is the case of *Higsons v. Burton* (26 L. J. 342, Ex.). There one Dix, who had been the agent of a responsible firm that had had dealings with the plaintiff in the action, was dismissed

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by his employers ; he concealed that dismissal from a customer of the firm, the plaintiff in the action, and continued to obtain goods from him still as acting for the firm. The goods were delivered to him, but it was held that that delivery was not a delivery to any person whatever who had purchased the goods. The goods, if they had been purchased at all, would have been purchased by the firm for which this man had acted as agent, but he had been dismissed from the agency, therefore there was no contract with the firm ; there was no contract ever intended between the vendors of the goods and the person who had professed to purchase the goods as the agent of that firm ; and the consequence was that there was no contract at all. There, as here, an innocent person purchasing the goods from the person with whom there was no contract was obliged to submit to the loss. The point of the case is put so very shortly by Pollock, C.B., that I cannot do better than adopt his reasoning : “ There was no sale at all, but a mere obtaining of goods by false pretences ; the property therefore did not pass out of the plaintiffs.” The other judges (Martin, Bramwell, and Watson, BB.) concurred in that judgment. Here, I say, exactly as in those cases of *Hardman v. Booth* and *Higgons v. Burton*, there was no sale at all ; there was a false representation made by Blenkarn, by which he got goods sent to him upon applications from him to become a purchaser, but upon invoices made out to the firm of Blenkiron and Sons. But no contract was made with Blenkarn, nor was any contract made with Blenkiron and Sons, because they knew nothing at all about it, and therefore there could be no delivery of the goods with the intent to pass the property. We have been pressed very much with an ingenious mode of putting the case on the part of the counsel who have argued for the appellants in this case, namely, suppose this fraudulent person had gone himself to the firm from whom he wished to obtain the goods, and had represented that he was a member of one of the largest firms in London. Suppose on his making that representation the goods had been delivered to him. Now I am very far (at all events on the present occasion) from seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent of that firm. Or suppose he had said : “ I am as rich as that firm. I have transactions as large as those of that firm. I have a large balance at my bankers ; ” then the sale would have been a sale to a fraudulent purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations ; and the parting with the goods in that case might possibly have passed the property. But this case is an entirely different one. The whole case, as represented here, is this : from beginning to end the respondents believed they were dealing with Blenkiron and Sons, they made out their invoices to Blenkiron and Sons, they supposed they sold to Blenkiron and Sons ; they

never sold in any way to Alfred Blenkarn; and therefore Alfred Blenkarn cannot by so obtaining the goods have by any possibility made a good title to a purchaser as against the owners of the goods, who had never in any shape or way parted with the property, nor with anything more than the possession of it.

Lord PENZANCE.—My Lords, the findings of the jury in this case, coupled with the evidence, warrant your Lordships in concluding that the following are the circumstances under which the respondents parted with their goods. Whether by doing so they passed the property in them to Alfred Blenkarn is, I conceive, the real question to be determined. The respondents had never seen, or even heard of, Alfred Blenkarn, when they received a letter, followed by several others, signed in a manner which was not absolutely clear, but which the writer intended them to take, and they did take, to be the signature of a well-known house of Blenkiron and Sons, which in fact carried on business at No. 123, Wood-street. The purport of these letters was to order the goods now in question. The house of Blenkiron and Sons was known to the respondents, and it was also known that they lived in Wood-street, though the respondents did not know the number. The respondents answered these letters, addressing their answers to Blenkiron and Sons, in Wood-street, but in place of No. 123 they directed them to No. 37, which was the number given in the letters as the address of that firm. In the result they sent off the goods now in dispute, and addressed them, as they had addressed their letters, to Blenkiron and Sons, No. 37, Wood-street, London. It was not doubted or disputed that throughout this correspondence, and up to and after the time that the respondents had despatched their goods to London, they intended to deal, and believed they were dealing with Blenkiron and Sons, and with nobody else; nor is it capable of dispute that when they parted with the possession of their goods, they did so with the intention that the goods should pass into the hands of Blenkiron and Sons, to whom they addressed these goods. The goods, however, were not delivered to Blenkiron and Sons, to whom they were addressed, but found their way into the hands of Alfred Blenkarn, owing to the number in Wood-street being given as No. 37 in place of No. 123, a mistake which had purposely been brought about by the writer of the letters, as I have before mentioned, who was no other than Alfred Blenkarn, who had an office at No. 37, Wood-street. In this state of things it is not denied that the contract or dealing which the respondents thought they were entering into with Blenkiron and Sons, and in fulfilment of which they parted with their goods and forwarded them to what they thought was the address of that firm, was no contract at all with them, seeing that Blenkiron and Sons knew nothing of the transaction. But the appellants say it was a contract with and a good delivery to Alfred Blenkarn, so as to pass the property in the goods to him, although the goods were not addressed to him, and the

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respondents did not know of his existence. I am not aware that there is any decided case in which a sale and delivery intended to be made to one man has been held to be a sale and delivery so as to pass the property to another, against the intent and will of the vendor. And if this cannot be, it is difficult to see how the contention of the appellants can be maintained. It was indeed argued that, as the letters and goods were addressed to No. 37 instead of No. 123, this constituted a dealing with the person whose office was at No. 37. But to justify this argument it ought at least to be shown that the respondents knew that there was such a person, and that he had offices there, whereas the contrary is the fact, and the respondents only adopted the number because it was given as the address in letters purporting to be signed "Blenkiron and Co." I am unable to distinguish this case in principle from that of *Hardman v. Booth* (*ubi sup.*) to which reference has been made. In that case Edward Gandell, who obtained possession of the plaintiff's goods, pretended to have authority to order goods for Thomas Gandell and Co., which he had not, and then intercepted the goods and made away with them; the Court held that there was no contract with Thomas Gandell and Co., as they had given no authority, and none with Edward Gandell, who had ordered the goods, as the plaintiffs never intended to deal with him. In the present case Alfred Blenkiron pretended that he was, and acted as if he was, Blenkiron and Sons, with whom alone the vendors meant to deal. No contract was ever intended with him, and the contract which was intended failed for want of another party to it. In principle the two cases seem to me quite alike. Another case of a similar kind is *Higgins v. Burton* (*ubi sup.*), to which similar reasoning was applied. Hypothetical cases were put to your Lordships in argument, in which a vendor was supposed to deal personally with a swindler, believing him to be someone else of credit and stability, and under this belief to have actually delivered goods into his hands. I do not think it necessary to express an opinion upon the possible effect of some cases which I can imagine to happen of this character, because none of such cases can, I think, be parallel with that which your Lordships have now to decide. For in the present case the respondents were never brought personally into contact with Alfred Blenkarn; all their letters, though received and answered by him, were addressed to Blenkiron and Sons, and were intended for that firm only; and finally the goods in dispute were not delivered to him at all, but were sent to Blenkiron and Sons, though at a wrong address. This appeal ought therefore, in my opinion, to be dismissed.

Lord GORDON concurred.

*Judgment appealed from affirmed, and appeal dismissed with costs.*

Solicitors for the appellants, *O. O. Humphreys and Son.*

Solicitors for the respondents, *Ashurst, Morris, Crisp, and Co.*

## COURT OF CRIMINAL APPEAL.

*Saturday, May 18, 1878.*

(Before LORD COLERIDGE, C.J., MELLOR, J., LUSH, J., CLEASBY, B.,  
and LOPES, J.)

REG. v. MORRIS ROBERTS. (a)

*Perjury—Deputy County Court judge—Evidence of appointment—  
9 & 10 Vict. c. 95, s. 111.*

*An indictment for perjury alleged the offence to have been committed before J. U., then being and sitting as the duly qualified and appointed deputy judge of the County Court of W. Proof was given that the perjury took place in the presence of J. U. at the County Court, and a certified minute, under the seal of the court, of the proceedings, was put in evidence, intituled "Minute of judgments, orders, and other proceedings, at a court holden at, &c., before J. U., deputy judge of the said court."*

*Held, that there was sufficient proof of J. U. acting as deputy judge, and therefore prima facie evidence of his appointment as such.*

*Held, also, per Lord Coleridge, C.J., that by the County Court Act (9 & 10 Vict. c. 95, s. 111), the minute of the proceedings, being made evidence of the proceedings and of their regularity, was evidence of the regularity of J. U.'s appointment.*

CASE reserved for the opinion of this Court by the Recorder of London.

The prisoner was tried before me at the Central Criminal Court on the 10th day of May inst. upon an indictment for perjury.

The indictment alleged the offence to have been committed before "Joseph Underhill, Esq., then being and sitting as the duly qualified and appointed deputy judge of the County Court of Warwickshire."

A minute of the proceedings of the County Court was put in as evidence on the part of the prosecution, which was intituled as follows :

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



REG. Minute of judgments, orders, and other proceedings at a court holden at Birmingham,  
v. in the county of Warwick, on the 18th day of November, 1877, before Joseph Under-  
ROBERTS. hill, Esq., deputy judge of the said court.

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A certificate was written on the minute in these words :

Evidence—  
Officer—Ap-  
pointment—  
Perjury.

We hereby certify that the above is a true copy of an entry in the minute book of judgments, orders, and other proceedings of the County Court of Warwickshire holden at Birmingham.

Dated this 4th day of December, 1877.

JOHN COLE }  
EDWIN PARRY } Registrars.

The certificate bore the seal of the County Court.

Proof was also given that the alleged perjury took place in the presence of Mr. Underhill, at the County Court.

An objection was taken by the counsel for the prisoner that proof should have been given of the appointment of Mr. Underhill as deputy judge.

I overruled the objection and left the case to the jury, who convicted the prisoner; but upon the application of the prisoner's counsel I have reserved this case for the opinion of the Court for the Consideration of Crown Cases Reserved,

Whether it was necessary that further or any proof of the authority of the presiding judge at the County Court beyond his acting in that capacity, and the production of the minute above mentioned should have been given.

(Signed) THOMAS CHAMBERS.

*Jelf* (*Archibald* with him) for the prisoner.—The conviction was wrong. There was no proof of the material fact that the person before whom the perjury was alleged to have been committed had authority to administer an oath. In other words, there was no sufficient proof of the appointment of the deputy judge. In 1 Hawk. P. C. bk. 1, c. 69, s. 4, it is said, "It seemeth clear that no oath whatsoever taken before persons acting merely in a private capacity; or before those who have taken upon them to administer oaths of a public nature without legal authority for their so doing; or before those who are legally authorised to administer some kind of oaths, but not those which happen to be taken before them; or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle." The onus of proving that the deputy judge was duly appointed was upon the prosecutor, and the minute produced was not sufficient evidence thereof. A County Court judge has the power of appointing a deputy by the 9 & 10 Vict. c. 95, s. 25, which enacts "that in case of illness or unavoidable absence, the cause whereof shall be entered on the minutes of the Court, it shall be lawful for the judge, &c., to appoint some other person, &c." [LUSH, J.—If an appointment had been legally proved in other respects, would you contend that it was necessary to prove the "cause" thereof?]

It would be necessary to prove some fact from which the cause might be presumed. In the present case the prosecution should have shown such an acting as deputy judge as to lead to the reasonable inference that the deputy was properly appointed. [Lord COLERIDGE, C.J.—In *Berryman v. Wise* (4 T. Rep. 366), Buller, J. said that in the case of all peace officers, justices of the peace, constables, &c., it was sufficient to prove that they acted in those characters without producing their appointments.] All the cases go to show that there must be evidence, not that the person acted *pro hac vice*, but that he had acted in the capacity on former occasions. [Lord COLERIDGE, C.J.—Would you contend that if perjury were committed before a County Court judge the first time he acted that his appointment should be formally proved? The 111th section of 9 & 10 Vict. c. 95, provides that the minutes, or a copy thereof, bearing the seal of the court, and purporting to be signed and certified as a true copy, shall be admitted in all courts and places as evidence of the proceedings and of the regularity of such proceedings.] The mere fact that a person has once acted in a public capacity is not sufficient proof that he has been regularly appointed. In *Rex v. Verelst* (3 Camp. 433) it appeared that Dr. Parson had acted as surrogate for twenty years, and that was held to be *primâ facie* evidence only of his due appointment. [Lord COLERIDGE, C.J.—The once acting in a public capacity is sufficient to make a *primâ facie* case that the person so acting is duly appointed: (*Wolton v. Gavin*, 16 Q. B. 48; 20 L. J. 73, Q. B.; *Reg v. Essex*, Dears & B. 369, 7 Cox C. C. 384).] The evidence in the present case is consistent with the fact that the barrister acting as deputy judge had been merely asked to act *eo instante* in the particular case without any written or proper appointment.

Lord COLERIDGE, C.J.—I am of opinion that the conviction should be affirmed. One of the best recognised principles of law, *Omnia præsumuntur esse rite et solemniter acta donec probetur in contrarium* is applicable to public officers acting in discharge of public duties. The mere acting in a public capacity is sufficient *primâ facie* proof of their proper appointment; but it is only a *primâ facie* presumption, and it is capable of being rebutted, and in the case of *Rex v. Verelst* that presumption was rebutted in fact, and the person who there had acted as surrogate for twenty years, was proved to have been improperly appointed. The case of *Rex v. Verelst* is exceedingly like this; there the fact of Dr. Parson having acted as surrogate was held by Lord Ellenborough, C.J., to be sufficient *primâ facie* evidence that he was duly appointed, and had competent authority to administer an oath, and for that proposition *Rex v. Verelst* was referred to as good law by Lord Campbell, C.J., in *Wolton v. Gavin*. But it was further shown in *Rex v. Verelst* that Dr. Parson had never been regularly appointed as surrogate, and Lord Ellenborough then held that the evidence that Dr. Parson was not duly appointed a surrogate could not be shut out, however long he

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might have acted in that capacity, and that the presumption arising from his acting only stood until the contrary was proved. That is an instructive case, as showing the true rule as to the *primâ facie* presumption in such cases. It is laid down in all the text books as a recognised principle that a person acting in the capacity of a public officer is *primâ facie* to be taken to be so, and that principle was adopted by Patteson, J., in *Doe dem. Bowley v. Barnes* (8 Q. B. 1043). In that case there was a demise by the churchwardens and overseers of some parish property, and the fact that they acted as churchwardens and overseers at the time of the demise was held to be sufficient *primâ facie* proof for the purpose of an action of ejectment without proving their appointment. His Lordship then referred to the decision of Tindal, C.J., to the same effect in *Reg. v. Newton* (Car. & Kir. 469), and to *Reg. v. Jones* (2 Camp. 131). This objection, if it were good, would extend very widely, for, suppose perjury committed on the first time of acting in his office before a judge or a recorder, or a County Court judge, or any person who fills a responsible public position, would it lie on the prosecution to show the appointment of such an officer in the strictest possible way? Mr. Jelf has not satisfied me that it would, and no member of the court has any doubt that there is no ground for such a contention. But further the County Court Act (9 & 10 Vict. c. 95), s. 111, provides that a copy of the minutes of the court bearing the seal of the court shall be evidence of the proceedings of the court and of the regularity of such proceedings, and a copy of the minutes bearing the seal of the court was proved which showed that Mr. Underhill was acting as deputy judge of the courts. The statute therefore makes this evidence of the regularity of the proceedings before him. The conviction will therefore be affirmed.

The rest of the Court concurred.

*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*Saturday, May 11, 1878.*

(Before Lord COLERIDGE, C.J., MELLOR, J., LUSH, J., CLEASBY, B.,  
and GROVE, J.)

REG. v. WELLINGS. (a)

*Evidence—Admissibility of deposition—Inability of witness to travel—Pregnancy.*

*It was proved that a witness who resided fifteen miles from the place of trial was in expectation of her confinement and on the morning of the trial was unable to move about without considerable difficulty, and was then lying down and had been so for the greater part of the week, though able to get up for a few minutes at intervals, and that she thought her confinement might not take place until the middle of the following week, but might also occur at any hour. No medical evidence was given upon the subject.*

*The presiding judge having admitted her deposition before the committing magistrate, on the ground that she was so ill as to be unable to travel within the meaning of 11 & 12 Vict. c. 42, s. 17, this court upheld his decision.*

CASE stated for the opinion of this Court by the Chairman of the Worcestershire Quarter Sessions.

At the Worcestershire adjourned Quarter Sessions, held on the 7th day of March, 1878, the above-named prisoner Thomas Wellings (with one William Mallars, who pleaded guilty) was indicted and tried before me for unlawfully assaulting one Ann Pugh, with intent her feloniously to ravish and carnally know.

On the opening of the case the counsel for the prosecution applied to put in evidence the deposition of Ann Pugh, the principal witness, on the ground that she was so ill as to be unable to travel, being in daily and hourly expectation of her confinement.

In support of his application he called the husband of Ann Pugh, who proved that he resided with his wife fifteen miles distant from the place of trial, and that when he left his wife on

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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that morning she was unable to move about without considerable difficulty ; that she was then lying down, and had been so during the greater part of the past week, though able to get up for a few minutes at intervals. In answer to a question from me the husband stated that his wife thought her confinement might not take place until the middle of the following week, but might, she also thought, occur at any hour. No medical evidence was tendered.

The counsel for the prisoner objected that this was not such an illness as was contemplated by the statute 11 & 12 Vict. c. 42, s. 17.

Acting upon what I considered my discretionary power I decided that the illness of Ann Pugh was such as came within the meaning of the statute, and that the foregoing evidence was sufficient to prove such illness, and her deposition was thereupon admitted.

The prisoner Thomas Wellings was found guilty, and was sentenced to be imprisoned and kept to hard labour for eighteen calendar months, and he is now in the Worcester prison in execution of such sentence.

The question upon which I respectfully desire the opinion of the Court is, whether under the circumstances above stated the deposition of Ann Pugh was properly received in evidence.

G. W. HASTINGS, Chairman of the above  
Court of Quarter Sessions.

*Selfe* for the prisoner.—The deposition ought not to have been admitted in evidence. The 11 & 12 Vict. c. 42, s. 17, enacts (*inter alia*) that if upon the trial of the accused it shall be proved “that any person, whose deposition shall have been so taken, is dead or so ill as not to be able to travel, and if it be also proved that such deposition was taken in the presence of the accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, &c., it shall be lawful to read such deposition as evidence in such prosecution.” This statutory power ought not to be extended further than it has already been. In this case the deponent was only fifteen miles away, and thought her confinement might not take place for a week. In *Reg. v. Wilton* (1 Fos. & Fin. 309), where Willes, J. admitted the deposition of a woman on the ground that she was ill and unable to attend, she having been, it was stated, delivered of a dead child, the learned Judge said : “It must not be supposed that the fact of a woman having been delivered nine days ago constitutes an illness within the meaning of the statute ; but we have it in evidence that she was delivered of a dead child, which would tend to produce a morbid state of body, and therefore I am of opinion her deposition may be read.” And in *Reg. v. Walker* (1 Fos. & Fin. 534) the same learned Judge said : “Illness from confinement is an ordinary state, and not such an illness as is contemplated by the statute. I have considered the question with my brother Crowder. If you find it necessary for

your case to put in the deposition, I have made up my mind to reserve the question for the opinion of the Judges. . . . I think it should be such an illness as will prevent a person from traveling." In *Reg. v. Huddersfield* (26 L. J. 169, M. C.) it was held that pregnancy was not such "sickness" as would prevent the removability of a pauper. In *Reg. v. Parker and Ashworth* (York Summer Assizes 1862), where it was proposed to put in the deposition of a married woman on the ground that she was pregnant, Mellor, J., said the matter had been much considered by the Judges, and the general opinion of the bench was that inability to travel arising from pregnancy alone was not such an illness as was contemplated by the statute. No doubt, in *Reg. v. Stephenson* (9 Cox C. C. 156; 31 L. J. 147, M. C.) it was held that there might be incidents in the state of pregnancy which would render a woman too ill to travel, and, as observed by Erle, C.J., in delivering the judgment, it was proved in that case that the woman was daily expecting her confinement, and was *poorly otherwise*, and therefore too ill to travel. The distance in that case was twenty-five miles. In the present case no medical evidence was given.

*Godson* for the prosecution.—The present case is precisely that of *Reg. v. Stephenson*, where it was decided that it is for the presiding Judge at the trial to decide in his discretion, whether the evidence that the witness is too ill to travel is sufficient. [He was then stopped by the Court.]

LORD COLERIDGE, C.J.—The question in this case is not whether the witness was ill or not, but whether "she was so ill as not to be able to travel" within the meaning of the statute, and I am of opinion that the conviction should be affirmed, and that the learned chairman at the trial properly admitted her deposition in evidence. We are all of opinion as matter of law that pregnancy may be, not that it must necessarily be, in any particular case, the source of such an illness as to bring a witness within the contemplation of the statute. Whether in the particular case the facts proved bring the witness within the statute it is for the presiding Judge to decide. The presiding Judge has here decided that this was a case within the Act, and we see no reason for saying that he has exercised his discretion wrongly.

The rest of the Court concurred.

*Conviction affirmed.*

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1878.

Evidence—  
Deposition of  
absent witness.



## COURT OF CRIMINAL APPEAL.

*Monday, May 18, 1878.*

(Before Lord COLERIDGE, C.J., MELLOR, J., LUSH, J., CLEASBY, B.,  
and LOPES, J.)

REG. v. GREATHEAD. (a)

*False pretences—Indictment—Evidence—Cheque.*

*By means of a false wage-sheet the prisoner obtained from his master a cheque for the amount stated in the sheet to pay the men's wages. The cheque was informally drawn, and payment was refused by the bank. The prisoner returned it to his master, telling him of the cause of its non-payment, and the master tore it up and gave another, which the prisoner cashed and appropriated the difference between what was really due for wages and what was falsely stated to be due in the wage-sheet.*

*On an indictment charging prisoner with obtaining 8s. 6d., the actual sum appropriated by the prisoner, it was objected that the above evidence did not prove the charge, for that he had by it only obtained the first cheque, which was a valueless piece of paper.*

*Held, that the false pretence was a continuing one, that the second valuable cheque was obtained thereby equally with the first, and that the charge was proved.*

CASE stated for the opinion of this Court by the Chairman of the West Riding of Yorkshire Quarter Sessions.

The defendant William Greathead was tried at the adjourned General Quarter Sessions of the peace for the West Riding of Yorkshire, held at Wakefield, on the 12th day of April, 1878, on an indictment charging him with obtaining certain moneys by false pretences from John Charles Collins, the prosecutor in the indictment mentioned.

The first count in the indictment alleged that the defendant unlawfully obtained on the 12th day of January, from the said John Charles Collins, 8s. 6d. in money, his property, with intent to defraud.

The second count alleged that the defendant unlawfully

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

obtained on the 2nd day of February, from the said John Charles Collins, 1*l.* in money, his property, with intent to defraud.

On the trial it was proved that the prosecutor engaged the defendant as his foreman over workmen employed by the prosecutor, and it was his duty to keep an account of the work done by the several workmen (who were paid by time) and of the wages due to them, and on the Saturday of each week to lay before the prosecutor a wage-sheet, showing the names of the different workmen employed and the number of days each man had worked during the week, and the amounts due to them respectively, upon the production of which wage-sheet, and acting upon such wage-sheet as correct, the prosecutor paid the amount either by cash or by cheque upon his bankers.

On the Saturday of the week ending the 12th day of January, the defendant made out the usual wage-sheet and presented it to the prosecutor, in which sheet a workman of the name of Cookson was represented to have worked five and a half days and to be entitled to the sum of 1*l.* 3*s.* 9*d.*, and another workman of the name of Wells was represented to have worked a like number of days and to be entitled to a like amount.

It was proved by the prosecutor that Cookson had worked only four and a half days in that week, and not five and a half days, and was entitled for work done in that week to the sum of 19*s.* 6*d.*, and not 1*l.* 3*s.* 9*d.*, as appeared by the wage sheet, and that Wells had also only worked four and a half days, and was also only entitled to 19*s.* 6*d.*, and not 1*l.* 3*s.* 9*d.*, as appeared by the wage-sheet, and that the total sum appearing by the wage-sheet for the week as 6*l.* 16*s.* 6*d.*, included the two sums of 4*s.* 3*d.* respectively, being the difference between the before-mentioned two sums of 19*s.* 6*d.* and 1*l.* 3*s.* 9*d.*, and that therefore the sum of 8*s.* 6*d.* was not due as appeared by the said wage-sheet.

The prosecutor, relying on the accuracy of the wage-sheet by the false pretence set out in the first count of the indictment, paid the total amount appearing due on the wage-sheet by a cheque on his bankers, but on presentation for payment at the bank it was found that there was a material omission in the body of the cheque, and the same was sent back to the prosecutor by the defendant, and the defendant informed the prosecutor of the fact, whereupon the prosecutor tore up the cheque and gave another cheque to the defendant for the same amount in lieu of the first, which second cheque was presented by the defendant to the bank and duly honoured and cashed, and the proceeds paid to the prisoner, who applied the 8*s.* 6*d.* to his own use, but properly disposed of the remainder.

There was no evidence of any further pretence at the time the defendant received the last-mentioned cheque. Unless the objection raised on behalf of the prisoner hereinafter set forth was

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valid there was ample evidence to go to the jury on the charge mentioned in the first count of the indictment.

Further evidence was given and facts proved in support of the second count of the indictment charging the defendant with obtaining a further sum by false pretences on the 2nd day of February, and it was not contended on behalf of the defendant that there was no evidence to go to the jury on that count.

At the close of the case for the prosecution it was objected by defendant's counsel that the evidence failed to support the first count of the indictment, on the ground that the whole matter was determined on the handing over the first cheque, and that instead of obtaining the sum of 8s. 6d. by false pretences the defendant had only obtained a piece of paper purporting to be a cheque of the value of 6l. 16s. 6d., which was of no value. And it was further contended that there was no evidence at the time of the defendant receiving the second cheque to show what was passing in the prosecutor's mind, as it might have been given to remedy the first cheque, and sustain the prosecutor's credit.

It was contended on behalf of the prosecution that there was a continuing pretence.

I overruled the objection of the defendant's counsel, but reserved the point and left the case to the jury.

The jury found a general verdict of guilty, and after it was objected that the verdict ought to have been entered upon the counts respectively, I sentenced the prisoner to four months imprisonment with hard labour. I agreed to admit him to bail, but bail was not forthcoming.

The question for the consideration of the Court of Crown Cases Reserved is whether on the above facts the conviction should be quashed.

HENRY LEATHAM, Chairman.

No counsel appeared to argue on either side.

LORD COLEBRIDGE, C.J.—The circumstances of this case are shortly these: The prisoner presented a false wage-sheet to his master, the prosecutor, and thereby got from him a cheque for the purpose of paying the men's wages as stated in the wage-sheet. He presented the cheque to the bank, and could not get it cashed, as there was a material omission in the body of it. The prisoner returned that cheque to the prosecutor and told him of the omission, and the prosecutor thereupon tore it up and drew another, which he gave to the prisoner. The prisoner cashed the second cheque and appropriated to his own use the difference between the actual amount of the wages and the amount falsely stated in the wage-sheet. Nothing was said by the prosecutor, but he merely substituted the good cheque for the informal one. Now, the good sense of the thing is, that the false pretence upon which the first cheque was given continued in force, and was the acting motive which influenced the prosecutor's mind in giving the second cheque. The conviction will, therefore, be affirmed.

LUSH, J.—I am of the same opinion. This was merely the substitution of a second cheque for the first, and it was given and obtained on the same false pretences as the first.

The rest of the Court concurred.

*Conviction affirmed.*

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*False pretences  
—Evidence.*

## COURT OF CRIMINAL APPEAL.

*Saturday, May 11, 1878.*

(Before Lord COLERIDGE, C.J., MELLOR, J., LUSH, J., CLEASBY, B.,  
and GROVE, J.)

REG. v. JARMAN. (a)

*False pretences—Indictment—Proof—Note of a non-existing bank.*

The prisoner was convicted of attempting to obtain a sewing machine by false pretences. The indictment alleged that the prisoner did falsely pretend that a paper partly in print and partly in writing, produced by the prisoner to the prosecutor and purporting to be a bank note for the payment to the bearer of 5l., was then a good, genuine, and available order for the payment of the sum of 5l., and was then of the value of 5l., &c.; by means of which false pretence the prisoner did unlawfully attempt to obtain a sewing machine. The evidence was that the prisoner bargained for the purchase of the sewing machine for 35s., and said that a friend had told her to get one and had sent her the money to pay for it, and at the same time gave a worthless bank note for 5l., payable to the bearer, of the Devonshire Bank, which had stopped payment many years ago. The prisoner knew at the time that the bank had stopped payment and that the note was of no value.

Held, that the indictment, though inartificially framed, sufficiently alleged that the prisoner falsely represented the note to be a good and genuine note of an existing bank, and of the value of 5l., and that the evidence supported the conviction.

CASE stated for the opinion of this Court by the Recorder of the city of Exeter.

At the Quarter Sessions for the city and county of the city of

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

REG.  
v.  
JARMAN.

1878.

*False Pretences—Indictment—Evidence.*

Exeter, holden at Exeter, on the 4th day of April, 1878, Jane Jarman was convicted before me of having attempted to obtain goods by false pretences.

The indictment charged that the said Jane Jarman unlawfully, knowingly, and designedly did falsely pretend to James Turner, that a certain paper, partly in print and partly in writing, produced by the said Jane Jarman to the said James Turner, and purporting to be a bank note for the payment to the bearer of the sum of 5*l.*, was then a good, genuine, and available order for the payment of the sum of 5*l.*, and was then of the value of 5*l.* By means of which said false pretence the said Jane Jarman did then unlawfully attempt to obtain from the said James Turner one chainstitch sewing machine of the goods and chattels of Messieurs Taylor and others, with intent thereby to defraud. Whereas in truth and in fact the said paper partly in print and partly in writing was not then a good, genuine, and available order for the payment of the sum of 5*l.*, nor was the same then of the value of 5*l.*, as she, the said Jane Jarman, then well knew at the time when she did so falsely pretend as aforesaid, against, &c.

The evidence was that the prisoner went to the shop of Messieurs Taylor and Co., and bargained with their manager, James Turner, for the purchase of one of their chainstitch sewing machines for the sum of 35*s.*; that she said a friend had told her to get one of them, and had sent her the money to pay for it, and at the same time gave him a bank note for the purpose of paying for it, which was partly in print and partly in writing, and of which the following is a copy :

No. A. 914, Devonshire Bank, £ Five.  
I promise to pay the bearer on demand £5 value received.

A.  
Exeter, 5th day of November, 1817. 914.  
For Williams, Cann, Searle, and Co.  
Five pounds. John Searle.

That the said James Turner told her that the note was worthless, and that he should detain it.

That the bank had stopped payment many years ago, and that the notes of the bank were of no value.

There was ample evidence to go to the jury that the prisoner knew, when she tendered the notes to James Turner, that the bank had stopped payment, and that the note was of no value, and that she tendered the note with intent to defraud. There was no further evidence of any false pretence by words.

I was of opinion that the said note was not an order for the payment of money, and that there was no evidence to support the allegation in the indictment that the prisoner falsely pretended that the said paper was a good, genuine, and available order for the payment of 5*l.*, and I entertained some doubt whether there was evidence for the jury to support the indictment, and whether, having regard to the want of proof of the alleged false pretence

that the said paper was an order for the payment of money, the indictment was sufficient to sustain a conviction. But I left the case to the jury, directing them to find the prisoner guilty if the evidence satisfied them that she knew, when she tendered the note to James Turner, that the bank had stopped payment, and that the note was of no value.

The jury found the prisoner guilty, and I postponed judgment, and discharged the prisoner on recognizance of bail to appear at the next quarter sessions for the said city and county and receive judgment, and I have stated this case for the consideration of the Court for Crown Cases Reserved as to whether there was evidence for the jury to support the indictment, and whether the indictment was sufficient to sustain the conviction, and whether the conviction ought to be affirmed or quashed.

C. G. PRIDEAUX, Recorder of Exeter.

No counsel appeared on either side.

LORD COLERIDGE, C.J.—I am of opinion that the conviction should be affirmed. The case states that the prisoner was convicted of having attempted to obtain goods by false pretences. And the indictment alleges that the prisoner unlawfully, knowingly, and designedly, did falsely pretend to the prosecutor that a certain paper, partly in print and partly in writing, produced by the prisoner to the prosecutor and purporting to be a bank note for the payment to the bearer of 5*l.*, was then a good, genuine, and available order for the payment of the sum of 5*l.*, and was then of the value of 5*l.*, by means of which said false pretences the prisoner did then unlawfully attempt to obtain from the prosecutor a sewing-machine with intent to defraud. Without saying that the words of the indictment describe the legal effect of this document (and I do not pause to inquire whether they give a strictly accurate description of it—it may be they do not), yet the ingredients of the offence appear to me to be set out in the indictment. It does, I think, sufficiently state that the prisoner attempted by false pretences to obtain the property of the prosecutor with intent to defraud and that she falsely pretended that a piece of paper, which she produced to the prosecutor, was a genuine note of a bank then existing and having power to issue notes. It was proved that there was no such existing bank and that the prisoner knew this and that the note was of no value.

The rest of the Court concurred.

*Conviction affirmed.*

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v.  
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—  
1878.  
—

*False pre-  
tences—In-  
dictment—  
Evidence.*



## COURT OF CRIMINAL APPEAL. ✓

*Saturday, May 18, 1878.*

(Before Lord COLERIDGE, C.J., MELLOR, J., LUSH, J., CLEASBY, B.,  
and LOPES, J.)

REG. v. YOUNG. (a)

*Rape—Married woman asleep—Belief that the prisoner was her husband.*

*While a married woman was asleep in bed with her husband, the prisoner got into the bed and proceeded to have connection with her, she being then asleep. When she awoke, she at first thought he was her husband, but on hearing him speak, and seeing her husband at her side, she flung the prisoner off, and called out to her husband, when the prisoner ran away.*

*Held the prisoner was guilty of the crime of rape.*

CASE stated for the opinion of this Court by Huddleston, B.

The prisoner, John Young, was indicted for a rape upon Johanna Hurley.

The evidence proved that the prosecutrix, a married woman, being partially under the influence of drink on the 2nd day of Feb. 1878, went to bed in her lodgings in the Seven Dials with her youngest child about nine o'clock; her husband with another child came home about midnight.

About four o'clock in the morning, when all four were asleep, the prisoner entered the room, the door not having been locked, got into the bed, in which were the prosecutrix, her husband, and the two children, and proceeded to have connection with the prosecutrix, "she being at the time asleep. When she awoke," (b) at first the prosecutrix thought that it was her husband, but on hearing the prisoner speak she looked round, and seeing her husband by her side, she immediately flung the prisoner off her, and called out to her husband.

The prisoner ran away, but before he could make his escape he was secured by a police-constable. None of the parties had ever seen the prisoner before.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) The words between the inverted commas were added by Huddleston, B., on being consulted by the Court during the argument, to clear up an ambiguity that had been suggested by the case as previously stated.

In answer to questions put by me the jury found that the prosecutrix did not consent before, after, or at the time of the prisoner's having connection with her, that it was against her will, and that the conduct of the prosecutrix did not lead the prisoner to the belief that she did consent.

I put the last question to the jury in consequence of what fell from Denman, J., in *Reg. v. Flattery* (2 Q. B. Div. 410-414; 13 Cox C. C. 38).

Upon these findings I directed a verdict of guilty, but reserved the question as to whether the conviction was right, the Court of Criminal Appeal in *Reg. v. Flattery* having expressed a desire that the case of *Reg. v. Barrow* (L. Rep. 1 C. C. R. 156; 28 L. J. 20, M. C.; 11 Cox C. C. 191), should be reconsidered: (See *Reg. v. Clarke*, Den. C. C. 397; 24 L. J. 25, M. C.; 6 Cox C. C. 412; *Reg. v. Jackson*, R. & R. 487.)

J. W. HUDDLESTON.

No counsel appeared for the prisoner.

*Lilley* for the prosecution.—The conviction was right. In *Reg. v. Camplin* (1 Den. C. C. 89; 1 Cox C. C. 220), where the prisoner made the prosecutrix, a girl aged thirteen, drunk, and whilst she was insensible violated her person, it was held that a rape was committed without the consent and against the will of the prosecutrix, although the jury found that the liquor was given to her for the purpose of exciting her and then having sexual intercourse with her, and not for the purpose of rendering her insensible. [CLEASBY, B.—In that case the girl was insensible and incapable of consenting. This case, as stated, says, "The prosecutrix at first thought it was her husband," and leads to an impression that she at first consented. In *Reg. v. Olarke* (6 Cox C. C. 412) it was held that if a married woman consents, under the belief that the man is her husband, the man cannot be convicted of rape.] [MELLOR, J.—The jury found that the prosecutrix did not consent before, after, or at the time of the prisoner's having connection with her, that it was against her will, and that the conduct of the prosecutrix did not lead the prisoner to the belief that she did consent. LUSH, J.—I will go and speak to Baron Huddleston as to this (a).] In *Reg. v. Mayers* (12 Cox C. C. 311) Lush, J., held that if a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist.

On the return of LUSH, J.

Lord COLERIDGE, C.J. said.—We are all of opinion that the addition made by the learned Baron to the statement of this case puts an end to any doubt as to the case, under the circumstances, being clearly one of rape.

The rest of the Court concurred.

*Conviction affirmed.*

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Rape—Evi-  
dence.

## COURT OF CRIMINAL APPEAL.

*Saturday, June 29, 1878.*

(Before COCKBURN, C.J., POLLOCK, B., FIELD, J., HUDDLESTON, B.,  
and LINDLEY, J.)

REG. v. PETCH. (a)

*Larceny—Wild rabbits—Taking and carrying away—Possession.*

*The prisoner was employed to trap wild rabbits, and it was his duty to take them, when trapped, to the head keeper. Contrary to his duty he trapped from time to time rabbits, and took them to another part of the land and placed them in a bag with intention of appropriating them to his own use, which another keeper observing, went and took some of the rabbits out of the bag during the prisoner's absence and nicked them and put them into the bag. His reason for nicking them was that he might know them again. The prisoner afterwards took away the bag and the rabbits :*

*Held, that the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them.*

THIS was a case reserved for the opinion of this Court by B. B. Hunter Rodwell, Esq., Q.C., M.P., the Chairman of the second court of the West Suffolk Quarter Sessions.

The prisoner was indicted under the statute 24 & 25 Vict. c. 96, sect. 67, for larceny, as a servant to the Maharajah Dhuleep Sing, of sixty-one dead rabbits, the property of his master. There was also a count for receiving.

The prisoner was employed by the Maharajah to trap rabbits upon a part of his estate, and it was the duty of the prisoner forthwith to take daily the rabbits so trapped to the head keeper.

On the morning of the 9th day of February, about half-past eleven, an under-keeper named Howlett, also employed by the Maharajah, was out on his beat in the parish of North Stowe, where he observed the prisoner go three or four times from the places where his rabbit traps were set to a spot near a furze bush on his beat. On examining this later in the day, he found

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law

sixty-one dead rabbits in a bag hidden in a hole in the earth near the furze bush. Howlett took twenty of the rabbits out of the bag and marked them by cutting a small slit under the throat. He then replaced them in the bag, and covered it up in the hole in the ground as before. In cross-examination Howlett said that his reason for marking the rabbits was that he might know them again.

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Early on the following Sunday morning the prisoner was seen by Howlett and a police constable, who had been watching the spot, to take the rabbits from the hole in the ground and put them in his cart, and he was driving the cart away along the road in a contrary direction to the head keeper's house, where he should have deposited them, when he was stopped and taken into custody by the police.

Counsel for the prisoner contended that there was no evidence to go to the jury of the larceny charged in the indictment, and referred to *Reg. v. Townley* (L. Rep. 1 C. C. R. 315; 12 Cox C. C. 59).

The Court, however, held that there was evidence to go to the jury of larceny, and that the present case was distinguishable from that of *Reg. v. Townley*, in consequence of the continuity of the possession having been broken by Howlett, the servant of the Maharajah, he having taken twenty of the rabbits out of the bag and marked them as described.

The Court agreed with the contention of counsel for the prisoner that there was no evidence of any intention on the part of the prisoner to abandon possession of the rabbits and this point was not left to the jury.

The Court left the case generally to the jury, who found the prisoner guilty of the larceny charged, and the prisoner was sentenced to three months' imprisonment with hard labour; execution of the judgment was respited until the decision of this Court.

The Court reserved for the opinion of this Court the question whether, upon these facts, the prisoner was properly convicted of the larceny charged.

*Kingsford (Malden with him).*—The conviction was wrong. There was no larceny here. "Theft may be committed by taking and carrying away without the consent of the owner (even if he knows and affords facilities for the commission of the offence) of anything which is not in the possession of the thief at the time when the offence is committed, whether it is in the possession of any other persons or not . . . . If the thing taken and carried away is for the first time rendered capable of being stolen by the act of taking and carrying away, and if the taking and carrying away are one continuous act, such taking and carrying away is not theft, except in the cases provided for in Arts. 326, 327. It seems that the taking and carrying away are deemed to be continuous, if the intention to carry away, after a reasonable time, exists at the time of taking:" (Sir J. F. Stephen's Dig. Crim.

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Law, Art. 296.) In this case the rabbits were always in the prisoner's possession and never in that of the master, and that being so, *Reg. v. Townley* is an authority that the prisoner is not guilty of larceny. This continuity of possession of the rabbits was not broken by the act of Howlett going and nicking the rabbits. This was done for the purpose of identifying them, not for reducing them into the possession of the master. [FIELD, J. —And with the intention that the prisoner should have possession of them.] The distinction taken by the Chairman is not consistent with the facts. The judgment of Blackburn, J., in *Reg. v. Townley* was referred to, and also the case of *Reg. v. Read* (14 Cox C. C. 17 ; L. Rep. 3 Q. B. Div. 131.)

No counsel appeared for the prosecution.

COCKBURN, C.J.—This conviction must be quashed. The case is really governed by that of *Reg. v. Townley*, where the law on the subject is fully stated in the judgment of Blackburn, J. At common law, to constitute larceny it was necessary that there should be a taking and carrying away of the chattel. And among the instances put in the old books are those of growing trees, and lead fixed to a building, which constitute part of the freehold, where a severance was necessary to turn them into chattels, and unless there was an interval between the one act of turning them into chattels and the other act of taking them away, during which there was a change in the possession from the person who severed them to that of the owner, the final act of carrying them away by the person who severed them did not form the subject-matter of larceny. So in the present case, although property in wild animals, as decided in *Blades v. Higgs* (11 H. of L. Cas. 621) becomes that of the owner by being killed on his land, it does not follow that, when a man without right goes upon the land and kills wild animals they become so reduced into the possession of the owner of the land as to render the man liable to the charge of larceny for carrying them away. In *Reg. v. Read* the principle was the same as that which governs this case. It is true that in that case the prisoner was employed to trap rabbits, and had authority to kill rabbits, and that availing himself of that authority, he trapped and killed rabbits, but that was not in fulfilment of his duty, but with the intention of taking the rabbits for his own purposes and not for his master. He reduced them into his own possession and not that of his master. In no sense did he reduce them into the possession of his master, for he took them direct from the trap to where the bag was concealed and put them into his bag. The only circumstance that appears to distinguish this case is the fact that the keeper Howlett marked some of the rabbits, but that was done, not with the intention of altering the possession of them, but for the purpose of identifying them. That fact does not make any difference in the case. I am of opinion that the conviction should be quashed.

POLLOCK, B.—I am of the same opinion. This case was reserved that it might be determined whether there was any dis-

inction between it and *Reg. v. Townley*, and whether the nicking of the rabbits by the keeper could be considered as a reducing of them into the possession of the master. There is really no distinction. It is impossible to say that all that the prisoner did was not in his conduct as a thief.

FIELD, J.—I am of the same opinion. There is no question raised as to any reduction of the rabbits into the possession of the master by the act of trapping them, but it is said that the continuity of possession by the prisoner was broken by the act of the keeper in going to the trap and nicking the rabbits. It appears to me that there is no foundation for any distinction between this case and *Reg. v. Townley*.

HUDDLESTON, B.—I am of the same opinion. There was no intention on the part of the prisoner to abandon his possession of the rabbits. I agree that the act of the keeper in nicking the rabbits was not for the purpose of reducing them into the possession of the master, but for identifying them. I do not agree in the distinction of this case from *Reg. v. Townley* drawn by the chairman of the court of quarter sessions. There was no evidence from which it might have been inferred that the rabbits had been reduced into the possession of the master.

LINDLEY, J.—I am of the same opinion.

*Conviction quashed.*

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## COURT OF CRIMINAL APPEAL.

*Saturday, June 29, 1878.*

(Before CROOKBURN, C.J., POLLOCK, B., FIELD, J., HUDDLESTON, B.,  
and LINDLEY, J.)

REG. v. HANCOCK AND BAKER. (a)

*Feloniously receiving—Restoration of stolen goods to owner—*

*Subsequent delivery to the thief for detection of the receiver.*

*A lad was detained on leaving his master's premises, and a policeman sent for, who searched him and took a stolen cigar, the property of his master, from him in the master's presence. In consequence of the lad's statement, the cigar was then returned to him with five others, which the lad took to the prisoner and gave to him.*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



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*Held, that the prisoner could not be convicted of feloniously receiving the cigars knowing them to be stolen, for that they were not stolen property at the time they were received, the master and the policeman having acted in concert in supplying the lad with the six cigars, and instructing him what to do with them.*

CASE reserved for the opinion of this Court by W. F. Harrison, Esq., Chairman of the Second Court at the General Quarter Sessions of the peace for the county of Surrey, held by adjournment at St. Mary Newington, on the 3rd day of June, 1878.

William Emmett Hancock and Henry Robert Baker were tried upon the following indictment:

Surrey.—The jurors for our Lady the Queen, on their oath present, that William Emmett Hancock, on the 23rd day of May, 1878, then being servant to James Gabriel, one cigar of the property of the said James Gabriel, his master, feloniously did steal, take, and carry away, against the form of the statute in such case made and provided.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that Henry Robert Baker on the same day and in the year aforesaid, one cigar (being the same property as the said William Emmett Hancock in the first count of this indictment is charged with stealing) of the property of the said James Gabriel, before then feloniously stolen, taken, and carried away, feloniously did receive and have, the said Henry Robert Baker then well knowing the same to have been feloniously stolen, taken, and carried away, against the form of the statute in such case made and provided.

The prisoner Hancock having pleaded guilty, the following evidence was adduced in support of the charge against the other prisoner Baker.

James Gabriel proved that he was a cigar manufacturer, at 320, Walworth-road, in the parish of St. Mary, Newington, in this county, and that the prisoner Hancock entered his service as shop boy on the day named in the indictment.

That about seven in the evening, as the prisoner was about to leave work for the day, the witness saw him take a cigar (without permission) from the mantelshelf of the shop, and put it in his pocket.

That witness having already missed goods, sent for a detective, and obtained the services of Edmund Reid, an officer of the P Division.

That witness saw Reid take the cigar from Hancock and mark it, and then give it back to the prisoner with five others and certain instructions.

This witness stated in cross-examination that he occasionally had in his possession broken cigars, which he worked up again, and was never in the habit of giving them to persons in his employ.

Edmund Reid proved that he was a detective officer of the P Division, and that between seven and eight in the evening of the day in question he was called to the prosecutor's, and in his presence searched the prisoner Hancock, and found the cigar in his trousers pocket. That he questioned this prisoner, and, in consequence of what he learnt from him, marked the cigar and returned it to him, at the same time giving him five other cigars and instructions how to act. That this prisoner thereupon went, followed by Reid, to a coal store, in Smith-street, Portland-street, Walworth, where Reid saw the other prisoner Baker standing; that Hancock went up to Baker and handed something to him. That Reid then accosted Baker, telling him who he was, and inquired what Hancock had given him, to which inquiry Baker replied "Nothing," meaning that Hancock had given him nothing. To which Reid replied, "I saw him give you something." That Baker then said, "I know you are a constable, and here they are," at the same time handing Reid six cigars, one being the marked one. That Reid thereupon said to Baker, "You've incited this boy to rob his master, and received the cigars he has stolen." That another lad named Maunders was there at the time. That he then apprehended Baker, and took him to the police-station.

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The prisoner Hancock, a lad thirteen years of age, was then called for the prosecution and gave the following evidence:

"On the 23rd May last I entered the employment of the prosecutor, and about seven p.m., on leaving work for the day, I took a cigar and put it in my pocket. Shortly after I gave it up to detective Reid, who returned it to me with some others. I took it because prisoner Baker, whom I knew, had told me to get him as many as I could. He had told me that day at dinner-time that if I did he would give me something on the following Saturday. I took all the six cigars to the coal store in Smith-street, where he works, and gave them to him. Detective Reid and William Maunders then came up, and Reid spoke to Baker, and then we all went to the police-station."

In cross-examination this witness stated that before coming to prosecutor's he had been in a printing office in the city, which was his first place, and lost it through being absent from work part of a day to get fitted with some new clothes. That he never said anything to Baker about boys being allowed damaged cigars, nor told him that prosecutor had offered him (Hancock) damaged cigars. That Baker did not say to him, "Get me some damaged cigars," but "Get me as many as you can."

William Maunders, another lad in the employ of the prosecutor, proved accompanying Hancock and detective Reid to Smith-street, and seeing Hancock hand some cigars to Baker, who said, "Thank you, I'll see you by-and-by, that'll do, won't it?" And then put them in his pocket; when some one standing near said, "Look out," and Baker then took them out of his

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pocket and held them in his hand under his coat, and after something more was said, handed them to Reid.

This witness stated in cross-examination that he had been two years in the prosecutor's employment, and that the latter had never given him a broken cigar. That when cigars were damaged they were made up afresh.

The statement made by the prisoner Baker before the committing magistrate was then put in and read as follows :

"Yesterday at dinner time Hancock came round to the coal shed and said, 'I have started work, Harry.' I said, 'Where at?' He said, 'At Gabriel's in the Walworth-road.' He said, 'Other boys have damaged cigars given them what gets chucked into the damaged bag, and Mr. Gabriel offered me two at dinner time.' He said, 'I wouldn't have them then, but Mr. Gabriel said he would give me some more to-night when I leave off work.' I said, 'I'll buy them of you.'"

This closed the case for the prosecution.

The prisoner Baker's counsel then submitted that there was no case to go to the jury, on the ground that the stolen cigar, the subject of the indictment, had been taken out of the possession of the thief by the detective officer in the presence of the owner, and was therefore not stolen goods when the prisoner Baker received it; and the case of *Reg. v. Dolan* (Dearsley C. C. 436; 6 Cox C. C. 449) was cited and relied on.

I refused, however, to stop the case, and told the jury, after the usual caution as to the prisoner's (Hancock's) evidence, that if they believed that the prisoner Baker received the marked cigar from Hancock with the knowledge and belief that the latter had stolen it, they ought to find him (Baker) guilty.

The prisoner having been convicted, his counsel applied that a case might be reserved for the opinion of this honourable court, which the court assented to, the judgment on the prisoner Baker being respited in the meantime, and the prisoner released on bail.

If the court should be of opinion that the conviction was right, it is to stand; otherwise it is to be quashed.

*Baggallay*, for the prisoner Baker, submitted, on the authority of *Reg. v. Dolan* (Dears. C. C. 436; 6 Cox C. C. 449), that the conviction was wrong. At the time Baker received the cigar from Hancock it had ceased to be a stolen chattel, it having been previously restored to its owners and given back to Hancock for a specified object. The fact that five other cigars along with the one Hancock had taken were given to him to take to Baker showed that Hancock was then acting under the owner's instructions.

COOKBURN, C.J.—At the time the cigar was received by the prisoner, it had been reduced into the possession of the master, or, if you please, of the police, and Hancock was then employed as an instrument to detect Baker.

HUDDLESTON, B.—The cigar was taken by the policeman, and the instructions to Hancock what to do with it were given by the policeman, but then the master was present all the time. In *Reg. v. Dolan*, Cresswell, J. said: "If it were necessary to hold that the policeman by taking the stolen goods out of the pocket of Rogers restored the possession of them to the owner, I should dissent. The goods in the policeman's hands were in the custody of the law, and the master could not have brought trover for them; but when they were given back to Rogers, and the master desired him to go and sell them, the master, I think, may be said to have employed Rogers for that purpose." That learned judge treated the thief as the agent of the master, for the purpose of detecting the receiver.

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COCKBURN, C.J.—In *Reg. v. Dolan* Lord Campbell evidently assumed that what was done in that case by the police was done in concert with the master. I should infer the same in the present case.

*Lilley* for the prosecution.—The conviction was right. When the cigar was taken from the prisoner Hancock by the police, it was in the custody of the law, and the policeman was not bound to restore it to the master. Here the master gave no authority to the policeman to act as he did. [COCKBURN, C.J.—Who gave the other five cigars to the policeman to give to him?]

COCKBURN, C.J.—The present case is undistinguishable in principle from *Reg. v. Dolan*, and the conviction must be quashed.

The rest of the Court concurred.

*Conviction quashed.*

## Ireland.

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### HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*May 2 and June 18.*

(Before MAY, C.J., FITZGERALD and BARRY, JJ.)

HEGARTY *v.* SHINE. (a)

*Assault—Contagious disease—Fraudulent concealment—Immorality—Reg. v. Bennett, 4 F. & F. 1105, and Reg. v. Sinclair, 13 Cox C. C. 28, dissented from.*

*In an action for assault, it was proved that the defendant, who was infected with venereal disease, had sexual connection with the plaintiff with her consent, concealing from her the fact of his being diseased. The plaintiff becoming in consequence diseased, brought her action for assault;*

*Held, per Fitzgerald and Barry, JJ. (May, C.J., dissentiente), that the action arose ex turpi causa, and could not be sustained.*

*Semble, the fact of concealment of the disease from the plaintiff could not constitute an assault, she having consented to the sexual intercourse.*

**A**CTION for breach of promise of marriage and for assault. The plaintiff and defendant had been living in a state of concubinage, and the defendant being infected with venereal disease, of which the plaintiff had no knowledge, had sexual connection with her, and infected her with the disease.

The action for breach of promise of marriage was not sustainable on the evidence. On the count for assault the jury found for plaintiff, damages 450*l.* A conditional order having been obtained to set aside the verdict,

*Heron, Q.C. (with him Johnson, Q.C. and Ronan) for the plaintiff showed cause.—There is no distinction between a civil and a criminal assault. The fact of infecting a person with venereal disease has been held an assault: (Reg. v. Bennett, 4 F. & F.*

(a) Reported by CHAS. R. ROOPE, Esq., Barrister-at-Law.

1105; *Reg. v. Sinclair*, 13 Cox C. C. 28.) Fraud does away with consent: (*Reg. v. Saunders*, 8 C. & P. 265; *Reg. v. Flattery*, 13 Cox C. C. 388.)

*Exham*, Q.C. and *O'Riordan*, *contra*.—This case should not be entertained by this Court. The Court is asked to become assistant to exacting the price of prostitution. *Ex turpi causa non oritur actio*. *Reg. v. Bennett* and *Reg. v. Sinclair* should not be followed; it was not necessary in them to decide that conveying infection of venereal disease constituted an assault. It has never been elsewhere decided. *Our. adv. vult.*

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FITZGERALD, J.—This action was for breach of promise of marriage and for an assault, the learned judge at the trial held the evidence was not sufficient to sustain the alleged promise to marry, and the plaintiff's counsel acquiesced in his rule. The question before us now is whether the action lies for an alleged constructive assault. The evidence was very voluminous, but for obvious reasons, I state its results as concisely as practicable. In 1874 the plaintiff was seduced by the defendant, and during the remainder of the year habitual sexual intercourse took place between them, which was continued down to November, 1875. The defendant swore he gave the plaintiff money on each occasion, save the first. In November, 1875, it was ascertained that the plaintiff was pregnant, and she left Listowell, her former place of residence, and went to reside in Cork, where in May, 1876, her child was born. Some time after the birth of the child, the medical attendant of the plaintiff discovered that both the mother and the child were affected with syphilis. The evidence was sufficient to establish that the disease had been communicated to plaintiff by the defendant in the course of the concubinage, and probably some time shortly prior to November, 1875, as a letter from the defendant to the plaintiff, given in evidence on part of plaintiff, indicates that there had been something wrong with him. On this evidence the plaintiff's counsel contended that the suppression by the defendant from the plaintiff of the fact that he was affected by disease, vitiated her consent to the particular act of intercourse in which disease had been communicated to her, which must therefore be taken to have been without her consent, and to amount to an actionable assault; and he relied on the case of *Reg. v. Bennett* (4 F. & F. 1105), in which Willes, J. held that an indictment for an indecent assault was maintained where the prisoner concealed from the woman that he was diseased and communicated the disease to her, on the ground that an assault comes within the rule that fraud vitiates consent. The learned judge, for the purposes of the trial, yielded to the authority of *Reg. v. Bennett*, and submitted certain questions to the jury with a direction in substance as follows: "That if the consent was obtained by the fraud of the party committing the act, the fraud vitiated the consent, and the act became in view of the law an



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assault, and that, therefore, if the defendant, knowing that he had a venereal disease, and that the probable and natural effect of his having connection with the plaintiff would be to communicate to her the venereal disease, fraudulently concealed from her his condition, in order to induce, and did thereby induce, her to consent to have connection with him, and if but for that fraud she would not have consented, and if he had connection with her and thereby communicated to her venereal disease, he had committed an assault and one for which they might give substantial damages." On that instruction in law the jury found, in fact, that defendant knew that he had disease and had communicated it to plaintiff, who did not know that he was so affected, and on those findings the verdict was entered for the plaintiff. I shall presently have to consider the authority of *Reg. v. Bennett*, and the application of the principle that fraud vitiates consent in such a case as that now before us. It seems to me, however, to be necessary to determine whether an action for a constructive assault, arising out of such transactions as the plaintiff has deposed to, can be maintained to recover pecuniary damages, or can in any shape receive the sanction of the Court. *Ex turpi causâ non oritur actio* is a maxim of the law and a rule of public policy, and its due application tends, if not to repress, at least to discourage, vice and crime. To constitute *causa turpis* it is not necessary the transaction should amount to a crime or to a breach of positive law. Immorality is sufficient. No Court should lend its aid to a plaintiff whose claim is founded on his or her own immoral acts. In the case of *Pearce v. Brooks* (L. Rep. 1 Ex. 218), Pollock, C.B. says, "Nor can any distinction be taken between an illegal and an immoral purpose. Whether it is an illegal or an immoral purpose in which the plaintiff has participated it comes equally within the maxim *Ex dolo malo non oritur actio*. No cause of action can arise out of one or the other." Then, does the plaintiff's supposed cause of action spring from her own immorality? What is it? It is that at some period in the course of a long continued prostitution of her person to the lust of the defendant, he suppressed from her the fact that he had contracted and was affected with venereal disease, and communicated that disease to her. The Judge and a jury were occupied for at least two days in investigating this case, and we have had the time of the Court taken up for a considerable period in examining into its loathsome details in order that the plaintiff should recover damages for results arising from her own immorality. The language of the judgment seat has been, "You shall not stipulate for iniquity;" and "No polluted hand shall touch the pure fountain of justice:" *Per Wilmot, C.J., in Collins v. Blantern* (2 Wilson). The policy of the law demands that for public protection the parties to illegal or immoral transactions shall have no redress against each other in a civil court for consequences flowing directly from their illegal or immoral acts. *Nemo ex*

*turpi causa consequitur actionem.* The dignity of the Court requires that it should not be called upon to investigate such transactions at the instance of either of the guilty participators, save where the public interests are involved in the repression of crime. The authorities on the subject are very numerous, but I shall allude to a few only, commencing with one of doubtful genuineness, *Everett v. Williams*, often referred to and given in a note to "Pothier by Evans," vol. 2, p. 3. There, though disguised in language, the suit turned out to be a bill for an account of the proceeds of property procured by highway robbery. The suit was stopped at once by the judge, who refused further to hear it, committed the solicitor, and fined the counsel who signed the bill. *Walker v. Perkins* (3 Burr. 1568) is a representative case. It appears there that the bond, the subject of the action, had been given by Wm. Perkins to the plaintiff Sarah Walker, and recited that they had agreed to live together. Lord Mansfield was peremptory and concise: "It is the price of prostitution, and illegal and void." The cases which follow *Walker v. Perkins* are too numerous for quotation and assume every shape and form. In *Pearce v. Brooks*, which I have before referred to, it was held that the plaintiffs, coachbuilders, could not recover from the defendant, a prostitute, the hire of a brougham supplied to her with a knowledge she was a prostitute, and would use the brougham as part of her professional display. The Chief Baron says: "The plaintiffs can derive no cause of action from such a bargain." In *Taylor v. Chester* (L. Rep. 4 Q. B. Div. 309), where the plaintiff deposited the half of a 50*l.* note as a security for suppers supplied by defendant, the keeper of a brothel, to be consumed by plaintiff and certain prostitutes in a debauch, it was held that, as the plaintiff could not recover the note without showing the true nature of the transaction, he was precluded from obtaining the assistance of the law, for the law will not assist an illegal transaction in any respect. Lord Mansfield puts the matter in its true foundation in *Holman v. Johnson* (Cowp. 348), where he says: "It is not for the defendants' sake that the objection that the transaction is immoral or illegal is ever allowed; it is founded on general principles of policy of which the defendant has the advantage. The principle of public policy is *Ex dolo malo non oritur actio*. No court will lend its aid to one who grounds his cause on an immoral or an illegal act. If from the plaintiff's own statement or otherwise the cause of action appears to arise *ex turpi causâ* on the transgression of the positive law of the country, then the Courts say he has no right to be assisted, they will not lend their aid to such a plaintiff." *Stockdale v. Onwhyn* (9 D. & Ry. 625) is also a representative case, followed by an infinity of others. It was an action for an infringement of copyright of a work, "Memoirs of Harriett Wilson;" plea not guilty. The work appeared to be immoral. The learned Judge at the trial held that the plaintiff was not entitled in respect of it to the

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protection of a court of law and non-suited him, Abbot, C.J. says, "to recognise the plaintiff's right would be to outrage every principle of common law, of common sense and of common justice, and therefore I, for one, am of opinion that we want no judicial authority for deciding that this action is not maintainable." *Fivaz v. Nichols* (2 M. Gr. & Sc. 501) is also deserving of attention. The pleadings are too long to be brought in here. The action arose out of an illegal agreement to pass a bill to be given to defendant in consideration of his abstaining from prosecuting C., who was charged with embezzlement, and it was held that, inasmuch as the plaintiff would not make out his case except through the illegal transaction to which he was a party, the action could not be maintained. Maule, J. says, "as soon as it had been shown that the transaction out of which the plaintiff's right to recover, if any arose, was illegal, the action was answered." It was urged, however, before us by plaintiff's counsel that this question does not arise on the record, as there is no defence relying on the immorality of the transaction. It seems to me, however, that the question is quite open, and that it does not lie with the plaintiff to say it is not. The plaintiff complains that the defendant assaulted her, that is to say, that he committed a forcible offence against her person; the defendant traverses the assault. Upon the evidence it appears that the use of the plaintiff's person of which she complains took place with her consent, and was therefore no assault. She calls on us, however, to inquire further into the transaction, to ascertain whether at the time of the particular act, by which she alleges disease was communicated to her, the defendant was diseased and knew that he was so, but suppressed the fact from her; and she asks us to determine and adjudge that, although she consented to the long course of concubinage or prostitution, and did in fact consent to the particular act of sexual intercourse in which disease was communicated to her, her consent was null and vitiated by the suppression of the defendant, and that she is entitled to treat that particular act of sexual intercourse as an assault. It seems to me that the whole matter is open, on the defendant's plea denying the assault, and that the moment it appeared on the plaintiff's evidence that the transaction itself was an immorality to which the plaintiff assented, there was an end of the action so far as it related to the assault. Probably the more correct course for the judge at the trial would have been to have declined to enter on the inquiry which the plaintiff's council demanded, and to have non-suited the plaintiff, inasmuch as no action can be maintained by the Court which springs *ex turpi causa*. But as the decision at the trial rested on *R. v. Bennett*, it becomes necessary to consider that case. Willes, J. there assumed that the prosecutrix, being capable of consenting, had consented to sexual intercourse with the prisoner, but would not have done so if she had known he was diseased; and then applying to the case the rule that fraud vitiates consent, held that

the prisoner was guilty of an assault in the act of sexual intercourse. I may observe on the case that it is the great repute of the Judge which alone entitles it to consideration. The ruling of the Judge was uncalled for by the facts. There was no consent to the prisoner's act. The girl stated that she fell asleep immediately on going to bed and recollected nothing. She was not aware that sexual intercourse had taken place, but a week afterwards was found to be infected with disease. The prisoner was undefended, and no question was reserved. The case resulted in a correct verdict, if as it appears there was no consent in fact to the sexual intercourse. Assuming, however, that there was evidence of consent, and taking the proposition as stated, which the judge intended to decide, it seems to me that it was a mistake to apply the principle to such a case and the consequence of doing so would be most serious. There is no doubt that fraud may vitiate consent, or to apply it more familiarly every contract implies consent, and no valid contract can be founded on a fraud. Fraud nullifies a contract, and if an action is instituted to enforce a supposed contract, it is a good answer that defendant's assent to it was obtained by fraud, or a suit may be instituted to rescind a contract on the ground that the plaintiff was induced to enter into it by fraud; but *R. v. Bennett* is the first instance in which the maxim was applied to an agreement for immoral sexual intercourse. I have always understood that the whole of a contract for an immoral purpose was absolutely void. If the maxim should be so applied where are we to stop? We must necessarily apply the rule *suppressio veri* in favour of the common prostitute who chooses to allege that some one of the people who have used her for pay has communicated disease to her. Respect for the Court prohibits me from following out the numerous and graphic illustrations put by defendant's senior counsel. I may point out that *R. v. Bennett* rests not on the vitiation of consent, but on the aggravated results. Thus the judge says that it was the fraud practised on the girl in concealing the fact of the prisoner's diseased state, which vitiated her consent to sexual intercourse, but would the indictment lie for an assault if it had not been for the subsequent result? *R. v. Bennett* is, in truth, a case in which a familiar maxim was strained and misapplied to reach a person who had undoubtedly been guilty of a great moral offence. We must not confound *R. v. Bennett* with a class of well decided cases, where the female having submitted to particular treatment was fraudulently subjected to sexual intercourse, as in *Reg. v. Flattery* (13 Cox C. C. 388), which was a case of rape on Lavinia Thompson, aged nineteen. The prisoner, professing to give medical advice, had sexual connection with the girl, having fraudulently induced her to believe that he was treating her medically, and to submit to his treatment because she so believed, the Court held (lamenting the decision in *R. v. Barrow*) that there was no evidence of consent.

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The prosecutrix submitted to a surgical operation to her cure, the prisoner fraudulently did another thing, she never consented or knowingly submitted to sexual connection. So in *Reg. v. Lock* (2 Cr. Cas. Res. 10) it was held that mere submission by one who does not know the nature of the act to be done cannot be consent, and in *Reg. v. Case* (Den. C. C. 580), which was an indecent assault on a girl of fourteen under pretence of medical treatment she submitted, believing it was medical treatment; *per curiam* she consented to one thing, and he did another materially different. *Per* Patterson, J., "the argument confounds active consent with passive non-resistance." *Per* Platt, B., "Here non-resistance was caused by his fraud, and he is therefore criminally responsible." In the case before us the defendant actively consented to the very thing, that is to say, sexual intercourse, with full knowledge and experience of the nature of the act. If *R. v. Bennett* is law, the statute 12 & 13 Vict. c. 76, s. 1, re-enacted by 24 & 25 Vict. c. 100, s. 49, was not necessary. By that enactment it is provided that whoever shall by false pretences, false representation, or other fraudulent means, procure any woman or girl under the age of twenty-one years, to have illicit intercourse with any man shall be guilty of a misdemeanour. *R. v. Bennett* derives no weight from *R. v. Sinclair* (13 Cox C.C.28), save the acquiescence of the judge in the maxim that consent will be vitiated by deceit. It was admitted in that case that there was no evidence of such an act of resistance as would justify a conviction for rape, but the girl did resist, and there was nothing from which consent could be inferred. The prisoner was convicted of an assault doing actual bodily harm, and I am not quite able to see how that verdict could be sustained in the particular case when the case failed as a rape. In *R. v. Bennett* it seems to have been forgotten that as a general rule an indictment does not lie for a mere private injury unless it in some measure concerns the Crown representing the public interests, or is accompanied by circumstances which amount to a breach of the peace. It was urged for the defendant that even though *R. v. Bennett* was well decided, yet that it did not follow that a civil action to recover damages would lie in respect of the same transaction. This is one of the difficulties which flows from *R. v. Bennett*. An assault is properly defined to be the commission of, or an attempt to commit, a forcible crime on the person of another; and if the transaction amounts in law to a criminal assault the logical result would seem to be that an action for damages may be maintained. But as an indictment lies only in the public interest, and not for a mere private injury, so there are many cases in which an indictment may be sustained, and yet no action lies for civil redress by any of the parties to the illegal transaction. In my opinion, even if the ruling in *R. v. Bennett* was correct, I should be prepared to hold that no action for an assault could, under the circumstances, be maintained. Fraud may vitiate



consent even in such a case for the purposes of criminal justice, though I may doubt its applicability where there has been no breach of the public peace. But can such suppression as is here alleged confer a right of action. In my opinion it cannot. The conclusions at which I have arrived are: First. That the maxim *ex turpi causa non oritur actio* is applicable. Secondly. That the Court should declare that it cannot permit such an action as the present to be entertained. Thirdly. That *R. v. Bennett* should not be followed. Fourthly. That the verdict for the plaintiff should be set aside, and a nonsuit entered if there has been a reservation at the trial. Although we cannot fail to have commiseration for the unhappy plaintiff, yet I am not unwilling by this decision to endeavour to relieve this Court from assuming the active guardianship of prostitution, and to respect the duty of enforcing the rule *uberrimæ fidei* in immoral contracts or transactions.

MAY, C.J.—In this case the plaintiff, Honora Hegarty, brought an action against the defendant, Daniel Shine. The summons and plaint contained four counts. The first two were grounded upon an alleged breach of promise of marriage. The third and fourth alleged that the defendant had assaulted and beat the plaintiff, and infected her with venereal disease. The defences were by way of traversing the alleged promise and denial of the acts complained of. The cause was tried before Barry, J., at the after sittings in Michaelmas, 1877. At the trial the plaintiff was unable to sustain in evidence the first count, and her case was vested upon the count charging an assault. The evidence established that the defendant had sexual intercourse with the plaintiff, who was a servant girl, at different times in the years 1874 and 1875, but there was no evidence that the plaintiff had had intercourse with other men. The plaintiff became pregnant in the autumn of 1875, and was delivered of a child in May 1876. The defendant had remitted money to the plaintiff from time to time, before and at the time of her confinement. It appears that at the time of the birth of the child, the plaintiff was suffering from two kinds of venereal diseases with which also her child was infected, and that the health of the plaintiff and her child was permanently injured. The plaintiff deposed she was not aware of the nature of her illness till after the birth of her child; at the trial the counsel for the defendant called upon the judge to direct a verdict for the defendant as no assault had been proved. The plaintiff's counsel on the other hand contended on the authority of two criminal cases decided in England, *Reg. v. Bennett* (4 F. & F. 1005), and *Reg. v. Sinclair* (13 Cox C. C. 28), that there was a case fit for the consideration of the jury upon the counts alleging an assault. The judge acceded to this view and instructed the jury to the following effect, that an assault implied an act committed upon a person against his or her will, and that as a general rule, when the person consented to the act there was no assault. But that if the

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consent was obtained by the fraud of the party committing the act such fraud vitiated the consent, and the act became in view of the law an assault; and that, therefore, if the defendant, knowing that he had venereal disease, and that the probable and natural effect of his having connection with the plaintiff would be to communicate to her such complaint, fraudulently concealed from her his condition, in order to induce, and did thereby induce her to have connection with him, and if, but for that fraud she would not have consented to have such connection, and if he had with her the connection so procured and thereby communicated to her such venereal disease he had committed an assault, and one for which the jury might on the evidence give substantial damages. Counsel for the defendant by way of objection to this charge again requested the judge to direct a verdict for the defendant, on the ground that the legal doctrine laid down in the cases relied upon was not applicable to a civil action in the case of a plaintiff of mature years. The jury found a verdict for the plaintiff, with 450*l.* damages. Counsel for the defendant, obtained a conditional order that the verdict be set aside on the ground, first, of misdirection; secondly, that the verdict was against the weight of evidence; and, thirdly, that the damages were excessive. On the two latter grounds I should not be disposed to disturb the verdict, as I think there was evidence upon which the jury were warranted in finding as they did, and there is no doubt the plaintiff sustained serious injury. The question principally argued before us was whether under the circumstances an action of assault was maintainable. In the case of *Reg. v. Bennett* (4 F. & F.) the prisoner was indicted for an indecent assault, and found guilty. [His Lordship here referred to the facts of the case, as set out before.] Where a man had connexion with a married woman by getting into her bed at night, and virtually pretending to be her husband, it was held that he was not guilty of rape, as the woman consented, but he was convicted of assault, on the ground that it was a fraud upon her (*R. v. Saunders* 8 C. & P. 265), and *Reg. v. Williams* (*Ib.* 286), is to the same effect. The question seems to be whether the legal principles on which these cases in criminal law are founded are applicable to a civil action. The definition of an assault appears to me the same, whether the proceedings be in a criminal court with a view to punishment, or before a civil tribunal with a view to the recovery of damages. An assault implies the absence of consent on the part of the complainant, and to an action of assault a plea of leave by licence was a bad plea, as amounting to the general issue: (*Christopher v. Bare*, 11 Q. B. 477.) But, supposing that in the present case the summons and plaint had stated that the defendant laid hands on the plaintiff, invaded her person, infecting her with disease, and the defendant had pleaded leave and licence of the plaintiff, which leave and licence was traversed; upon that issue the case would, I think, have come before the jury precisely as it has

done upon the issue whether the defendant assaulted the plaintiff. And it appears to me that the doctrine as laid down by Judge Willes and other judges in England, that consent procured by fraudulent concealment is void in point of law, is applicable to an action like the present before a civil tribunal. It is not difficult to suggest cases of a less unpleasant nature than that before the Court. If a patient submits to the performance of an operation by a surgeon, he cannot treat that as an assault, nor complain of injurious consequences. But, supposing that the operator used in the operation a poisoned instrument, knowing the injurious result that would follow, could not the person injured sustain an action of assault, as for a trespass committed on the person without his consent. Could he not establish that to such an operation including such consequences he did not consent, though he did permit an operation of a different character. In the case of *Reg. v. Bennett*, and the cases of *Reg. v. Saunders* and *Reg. v. Williams* it appears to me that the same Judges who held that the prisoners were guilty of assaults, would equally have held that the persons assaulted might have maintained civil actions for damages arising out of the same transaction. I do not think that the circumstance that the plaintiff had been seduced or debauched by the defendant, and had on previous occasions consented to his embraces, makes any material distinction, the jury having virtually found that on the particular occasion in question she would not have consented had the defendant disclosed his state of health. Nor do I think that the maxim *Ex turpi causâ non oritur actio*, is applicable to the present case. That principle I think governs cases of contract. A promise cannot be supported, on the contrary is vitiated, by an immoral consideration, nor can a contract be enforced if its object be to promote and encourage immorality or illegality. But the present case is founded on tort. The defendant has done an act injurious to the plaintiff and has done it wilfully and intentionally. Upon the authority of the case referred to, I think it must be held that this wrong was done to her without her consent. It does not occur to me that the Court, if it hold the defendant liable in damages to the plaintiff in this case would be sustaining immorality. It seems to me, on the other hand, that the imputation of injustice would rest upon a decision holding that a defendant, who has inflicted a life long injury upon his victim by depriving her of her bodily health should escape with impunity because he had previously deprived her of her chastity and obtained possession of her person.

BARRY, J.—Concurring, as I do, in the judgment pronounced by my brother Fitzgerald, and, generally speaking, for the reasons which he has assigned, I do not mean to occupy time by giving a separate judgment which would merely result in my feebly repeating what he has expressed in a manner so masterly and concise. I entirely agree with the expressions which have fallen from my Lord, of sympathy and pity for the

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sufferings of the plaintiff, fallen though she may be; but I cannot help coming to the conclusion that the maintenance of this action would be a violation of the settled and politic maxim *Ex turpi causâ non oritur actio*. It was contended by Mr. Heron that this maxim only applies to actions brought for the purpose of enforcing and having the benefit of an illegal and immoral contract, but in the case of *Fivaz v. Nicholls* (referred to by my brother Fitzgerald), the action was for a conspiracy to obtain payment of a bill given by the plaintiff for an illegal consideration. I confess, however, I still am pressed with the difficulty which I felt at the trial, namely, whether on a mere traverse of the assault, I could have nonsuited the plaintiff and directed a verdict against her, assuming, as I felt bound at *Nisi Prius* to assume, that the cases of *R. v. Bennett* and *R. v. Sinclair* were rightly decided, and that the defendant had accordingly committed an indictable assault. There may be cases where an indictment may be maintained, though the complainant may not be able to obtain damages in an action, but these cases would, I apprehend, be found to involve some breach of the public peace or public order, and not to be like the present case of a private transaction between two parties where one of them receives a personal injury. I therefore feel called upon to say, though I do so with the most unfeigned diffidence from the respect I entertain for an opinion expressed by my late lamented friend, Mr. Justice Willes, that these cases are not to be followed. It appears to me that in *R. v. Bennett* Willes, J., somewhat hastily, and on the facts of the case, unnecessarily, extended the doctrine that fraud is equivalent to force further than it was ever before carried. It is not easy to see why, if the reasoning of the learned judges were well founded, the persons in these cases were guilty only of an assault and not of rape. I am, of course, aware of the series of decisions ending with *R. v. Barrow* (L. Rep. 1 C. C. R.), that a man obtaining possession of the person of a married woman by fraudulently pretending to be her husband is not guilty of rape, but in *Reg. v. Case* (1 Den. 380), Wilde, C.J. says: "The cases which have been referred to show that where the consent is caused by fraud the act is at least an assault, and perhaps amounts to rape," and in *R. v. Flattery* (13 Cox C. C.), Kelly, C.B. expresses his regret at these decisions as to married women; and others of the judges intimate a desire that these cases should be reconsidered in the Court of Criminal Appeal, and in the last edition of Russell on Crimes, vol. 1, p. 861, a similar suggestion is made by the learned editor, a Queen's counsel of considerable eminence and experience. But however that may be, whether the offence of intercourse obtained by fraud be an assault or a rape, in all the other cases, where it was held that the act of coition or indecency was an indictable offence, notwithstanding consent or absence of resistance, it will be found that the person injured or assaulted was either asleep or unconscious, or from mental imbecility, or

youth, or a state of pupillage or the like, helplessly submissive to the prisoner's will, or from some such cause, or the fraudulent contrivance of the prisoner, was unaware of the moral nature of the act committed. In the case of a married woman, she believes she is submitting to her husband, not to a stranger. In *R. v. Case* the girl believed she was undergoing a surgical operation, and not sexual pollution, and so on in the other cases. In fact it is an inaccuracy to say that in these cases "fraud vitiates consent;" it is more accurate to say there is no consent at all to the prisoner's act, or to adopt the language of the judge in some of the cases, the consent is given to one thing and the prisoner does another. In the present case the plaintiff deliberately and knowingly consented to the act of sexual intercourse, which is the assault relied on, the alleged fraud was the concealment from her, not of the nature of the assault, but of the danger of a physical consequence of her wilful act of immorality; and I do not think she ought to be heard either in a civil or criminal court to allege that the act was done against her will, so as to constitute an assault *volenti non fit injuria*. I do not intend these observations as a separate judgment. I merely mean to express my concurrence in the able judgment of my brother Fitzgerald.

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## United States.

### COURT OF APPEALS OF KENTUCKY.

Wednesday, April 17.

COMMONWEALTH v. HAWES.

*Extradition—Trial for another offence.*

*Under the extradition treaty of 1843 with Great Britain, a person surrendered to the United States by virtue of its provisions cannot be tried upon a charge different from that for which he was extradited; and for which his surrender could not have been demanded.*

### EXTRADITION.

Smith N. Hawes stood indicted in the Kenton Criminal Court for uttering forged paper, for embezzlement, and upon four

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several charges of forgery. He was found to be a resident of London, Canada, and in February, 1877, was demanded by the United States and surrendered by the Canadian authorities, to answer three of the said charges of forgery. He was tried upon two of the indictments for forgery, the other two being dismissed, and was acquitted. He was held in custody, however, to answer the charges of embezzlement, &c., and in August, 1877, he moved upon affidavit to be released from custody.

The Court (Jackson, J.), ordered that the cases of *The Commonwealth* against *Hawes* for embezzlement, &c., be continued, and the prisoner released from custody. The Commonwealth appealed.

*Moss* (Attorney-General) and *W. W. Oleary*, for appellant.

*J. C. Carlisle* and *J. W. Stevenson*, for appellee.

LINDSAY, C.J. (after stating the facts).—It was the opinion of the learned judge who presided in the court below, that the tenth article of the treaty of 1842 impliedly prohibited the Government of the United States and the Commonwealth of Kentucky from proceeding to try Hawes for any other offence than one of those for which he had been extradited, without first affording him an opportunity to return to Canada, and that he could not be lawfully held in custody to answer a charge for which he could not be put upon trial. A public treaty is not merely a compact or bargain to be carried out by the executive and legislative departments of the general government, but a living law, operating upon and binding the judicial tribunals, state and federal, and these tribunals are under the same obligation to notice and give it effect as they are to notice and enforce the Constitution, and the laws of Congress made in pursuance thereof: (Fed. Cons. sect. 2, Art. 6; 2 Pet. 253, *per* Marshall, C.J.) When it is provided by treaty that certain Acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties the compact does not need to be supplemented by legislative or executive action, to authorise the courts of justice to decline to override these limitations, or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the “supreme law of the land.” The tenth article of the treaty of 1842 is as follows: “It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his



apprehension and commitment for trial, if the crime or offence had there been committed," &c. Public treaties are to be fairly interpreted, and the intention of the contracting parties to be ascertained by the application of the same rules of construction and the same course of reasoning which we apply to the interpretation of private contracts. By the enumeration of seven well-defined crimes for which extradition may be had, the parties plainly excluded the idea that demand might be made as matter of right for the surrender of a fugitive charged with an offence not named in the enumeration, no matter how revolting or wicked it may be. By providing the terms and conditions upon which a warrant for the arrest of the alleged fugitive may be issued, and confining the duty of making the surrender to cases in which the evidence of criminality is sufficient, according to the laws of the place where such fugitive is found, to justify his commitment for trial, the right of the demanding government to decide finally as to the propriety of the demand, and as to the evidences of guilt, is as plainly excluded as if that right had been denied by express language. The precise purpose for which the fugitive is to be surrendered is set out in exact and apt language, and the Act negatives, by necessary implication, the right here claimed, that the person surrendered may be tried for an offence different from that for which he was extradited, and one for which his surrender could not have been demanded. The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express and implied, of the treaty. The rule as stated by Mr. Lawrence is: "All the right which a power asking an extradition can possibly derive from the surrender must be what is expressed in the treaty, and all rules of interpretation require the treaty to be strictly construed; and, consequently, when the treaty prescribes the offences for which extradition can be made, and the particular testimony to be required, the sufficiency of which must be certified to the executive authority of the extraditing country, the state receiving the fugitive has no jurisdiction whatever over him, except for the specified crime to which the testimony applies." This is the philosophy of the rule prevailing in France. The French Minister of Justice, in his circular of April 15, 1841, said: "The extradition declares the offence which leads to it, and this offence alone ought to be inquired into." The rule as stated by the German author Heffter is, that "The individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes or misdemeanors, would be to violate the mutual principle of asylum, and the silent clause contained by implication in every extradition." And when President Tyler expressed the opinion that the treaty of

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*Extradition.*

1842 could not be used to secure the trial and punishment of persons charged with treason, libels, desertion from military service, and other like offences, and when the British Parliament in 1843, and the American Congress in 1848, assumed to provide that the persons extradited by their respective Governments should be surrendered "to be tried for the crime of which such person shall be so accused," this dominant principle of modern extradition was both recognised and acted upon. This construction of the tenth article of the treaty is consistent with its language and provisions, and is not only in harmony with the opinions and modern practice of the most enlightened nations of Europe, and just and proper in its application, but necessary to render it absolutely certain that the treaty cannot be converted into an instrument by which to obtain the custody and secure the punishment of political offenders. Hawes placed himself under the guardianship of the British laws by becoming an inhabitant of Canada. We took him from the protection of those laws under a special agreement, and for certain named and designated purposes. To continue him in custody after the accomplishment of those purposes, and with the object of extending the criminal jurisdiction of our Courts beyond the terms of the special agreement, would be a plain violation of the faith of the transaction, and a manifest disregard of the conditions of the extradition. He is not entitled to personal immunity in consequence of his flight. We may yet try him under each and all of the indictments for embezzlement, and for uttering forged paper, if he comes voluntarily within the jurisdiction of our laws, or if we can reach him through the extradition clause of the Federal Constitution, or through the comity of a foreign Government. But we had no right to add to, or enlarge the conditions and lawful consequences of his extradition, nor to extend our special and limited right to hold him in custody to answer the three charges of forgery, for the purpose of trying him for offences other than those for which he was extradited. We conclude that the Court below correctly refused to try Hawes for any of the offences for which he stood indicted, except for the three charges of forgery mentioned in the warrant of extradition, and that it properly discharged him from custody.

*Order affirmed.*

## Ireland.

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### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

*Tuesday, October 1.*

(Before O'BRIEN, J., in Chambers.)

*Re JOHN REA. (a)*

*Contempt of Court—Warrant to commit—Form of warrant—Statement of offence to party guilty of contempt—Opportunity of showing cause against order.*

*Where a solicitor practising before a petty sessions court persisted in interrupting the bench by shouting and conducting himself in a disorderly manner, and was in consequence committed to gaol for seven days, it was held :*

*1st. That the warrant of committal need not be headed with the title of the case which was at hearing when the offence took place.*

*2nd. The offence need not be stated in the committal part of the warrant, provided it appear sufficiently on the face of the warrant what the offence was.*

*3rd. The warrant need not specify the date from which the imprisonment is to commence, such period commencing from the date of the warrant.*

*Semle, that the alleged offence should have been stated to the offender before the order for his committal was made, and an opportunity given to him to show cause against it.*

**M**OTION to discharge from custody John Rea. The prisoner was brought up on a writ of *habeas corpus* addressed to the governor of Downpatrick gaol. The facts of the case, as appeared from the affidavits, were as follows: Mr. Rea, when acting as solicitor for a prisoner at petty sessions held at Gilford,

(a) Reported by **CECIL R. ROCHE** Esq., Barrister-at-Law.

*Re JOHN REA.* in the co. Down, persisted in interrupting the court by shouting and comporting himself in a disorderly manner. He was in consequence committed to gaol under the following warrant :  
 1878.  
 Contempt—  
 Committal.

Petty Sessions (Ireland) Act, 1851, 14 & 15 Vict. c. 93. Form E. B.

Warrant to commit or retain for trial. The Queen and the Justices assembled at the Sessions at Gilford, complainants; John Rea, defendant. Petty sessions district of Gilford, co. Down.

Whereas at the court of petty sessions held at Gilford on the 25th day of September, 1878, defendant, Mr. Rea, insisting upon interrupting and insulting the Court by shouting at the court in the most violent and unseemly manner, and, although frequently called upon by the Court, continued to do so in such a way that no member of the Court was even able to speak, the Court directed that Mr. Rea be imprisoned in Downpatrick gaol for one week, for insult and contempt of it; this is to command you, to whom this warrant is addressed, to lodge the said John Rea, of Belfast, in the gaol of Downpatrick; there to be imprisoned by the keeper of the said gaol as follows: for the space of one week. And for this the present warrant shall be a sufficient authority to all whom it may concern. (Signed) C. D. Clifford Lloyd, justice of the said county; R. M., chairman of the Court. Dated this 25th day of September, 1878. To the sub-inspector of Royal Irish Constabulary, Banbridge.

The affidavits were contradictory as to whether, prior to the actual committal, Mr. Rea was called on to show cause against it, and informed of the nature of his offence. Mr. Rea was not actually given into the custody of the gaoler of Downpatrick gaol till the day after his arrest, which took place on the day on which the warrant was dated.

*Keogh*, with him *White*, for the defendant.—The warrant is bad, because, in the first place, it is headed in a non-existing cause; it should have been headed in the name of the cause which was before the Court. The warrant should state the date of the committal; but it does not, and consequently the commencement of the imprisonment is uncertain. On the authority of *Re Pollard* (L. Rep. 2 P. C. C. 106) the prisoner should have been given an opportunity of showing cause against his committal, the specific offence of which he was charged should have been stated to him before he was committed. The charge is not specific; merely interrupting the Court is no offence, it may be the duty of a professional man to do so. The offence of insulting the Court should be stated to have been done wilfully. The warrant ought to state the alleged offence clearly: (*Levy v. Moylan*, 10 C. B. 189; *Sir W. Wyndham's case*, 2 Gabb. C. L. 178.)

*Purcell*, Q.C., for the magistrates, *contra*.—As to the objection that the warrant should have stated the insult to be wilful, see *Re the Sheriff of Middlesex* (11 Ad. & E. 273). It is not necessary to state the time at which the committal was made: (*Re Bowdler*, 12 Q. B. 612.)

Some other objections raised to the warrant during the argument appear sufficiently set out in the judgment.

O'BRIEN, J. — Several objections have been taken to the warrant in this case. Some of them, as to the warrant not being under seal, and not having been directed to the gaoler, have

been abandoned by Mr. Keogh, and there are others for which (though they were not actually given up by Mr. Keogh) no substantial reasons have been assigned. No ground has been suggested for holding that the provisions in the statute respecting contempt of court do not apply to professional persons engaged in the case at hearing as well as to others. The words of the statute are general, applying to acts done by any person, and there is nothing in the statute to restrict the application of these words. I am also of opinion that the warrant is not defective by reason of its not having been entitled in the case pending at the time the alleged contempt was committed. Contempt of court is an offence, and may be committed although no case was then actually under consideration. And no reasons have been assigned why (if the party guilty of such contempt was sentenced for it) the title of the warrant of committal should not correspond with the offence charged, as it does in the present case. Mr. Keogh has also argued that the warrant does not show that Mr. Rea had committed any contempt of court. The objection cannot, I think, be sustained, having regard to the statements in the warrant as to Mr. Rea's continued interruptions and violence, &c.: (*Levy v. Moylan*, 10 C. B. 189.) The warrant by its terms also shows that it was made by a justice or justices sitting in Court (within the meaning of 13 & 14 Vict. c. 93, s. 9), it was signed by Mr. Lloyd as chairman of the Court, and it was not requisite to state whether one or more justices were sitting with him. It also shows that the objection of Rea's Christian name not being stated in the warrant does not arise. The warrant states the acts complained of to have been done by the defendant Mr. Rea, and the title states John Rea to be the defendant. Another objection relied on is that the committing part of the warrant does not specify the offence; but the previous part of the warrant stated that he was to be imprisoned for one week for contempt of Court, and it was altogether unnecessary to repeat that statement in the subsequent part. It was further objected that the warrant did not specify the time from which the week of imprisonment should be computed; but, as the order was dated the 25th day of September, the clear construction of the order is that the week should commence from that date, and that construction cannot be affected by the circumstance that, from the distance of Downpatrick gaol, Mr. Rea was not in fact given in custody to the governor of the gaol till the following day. It is conceded that Mr. Rea should not be kept in custody after the expiration of that week. Another objection was that the words Downpatrick gaol in the warrant are not a sufficiently clear description of the place in which Mr. Rea was to be imprisoned; but this is also unsustainable. It is not suggested that there is any other gaol in Downpatrick except the county gaol. Another objection, however, has been taken by Mr. Keogh, in support of which he relied upon the decision of the Judicial Committee of the Privy Council in *Pollard's case*

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*Contempt—*  
*Committal.*

*Re JOHN REA.* (L. Rep. 2 P. C. 120), in which it was laid down by the Court in their judgment "that no person should be punished for contempt of Court (which was a criminal offence) unless the specific offence charged against him was distinctly stated, and an opportunity of answering it given to him;" and it was further stated in the judgment that, in the case before them, "the Court were not satisfied that a distinct charge of the offence was stated, with an offer to hear the answer thereto, before sentence was passed." Mr. Keogh contended that the principles laid down in that case applied to the present, notwithstanding the difference of the facts. It would apparently follow from that judgment that, before any order to commit a party for contempt of Court be made, he should be told what was the conduct on his part which was relied on as a contempt, and for which it was proposed to commit him, and should be allowed an opportunity of showing cause why such order should not be made. The affidavits in this case are conflicting as to what took place on the occasion in question; but in my opinion they do not satisfactorily establish or show that such a course was adopted, or that Mr. Rea, before the order for his committal was made, was apprised of the specific offence with which he was charged, or had an opportunity of answering it or of showing that the order should not be made. The question as to the application to the present case of the rule laid down in *Pollard's case* is not, in my opinion, free from doubt. It may not be necessary to state in the warrant that, before the order was made, the specific offence charged was stated to the party, and an opportunity of answering it given to him; but I see no reason why in fact such a course should not be adopted, or what difficulty would result from it, and, although I entertain some doubt in the case, I think the more expedient order for me to make is to direct Mr. Rea's immediate discharge. Although he would, at all events, be entitled to his discharge to-morrow, his detention till then would be a restraint of his personal liberty which, even for so short a time, should not be interfered with in such a doubtful case.

*Order accordingly.*

## CENTRAL CRIMINAL COURT.

OCTOBER SESSION, 1878.

(Before BRETT, L.J.A.)

REG. v. KEARY. (a)

*Inability to plead—Insanity—What proof of, necessary.*

LUCY KEARY was indicted for murder. On the prisoner being arraigned, her counsel, *Besley*, proceeded to call evidence to prove that, at different periods of her imprisonment since the commission of the alleged murder, she had been insane. Upon this

BRETT, L.J., said it did not matter what had been the condition of mind, the real question being whether the accused had sufficient understanding at the present time. Could she understand at that moment that she was charged with murder? Did she understand sufficient to be able to plead to the indictment? It did not matter, for the present purpose, whether she had been insane at any time.

## CENTRAL CRIMINAL COURT.

OCTOBER SESSION, 1878.

(Before BRETT, L.J.A.)

REG. v. DART. (a)

24 & 25 Vict. c. 100, s. 14—“*With intent*”—Prisoner must be proved to have full possession of faculties—Intention to be proved to satisfaction of jury—Medical testimony not always necessary.

PRISONER, Eliza Dart, pleaded not guilty to an indictment charging her with having thrown her child into the Serpentine river “with intent” to drown, &c., under sect. 14 of the above statute, which enacts that “whosoever shall attempt to . . . drown, suffocate, or strangle any person, with intent . . . to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony.”

(a) Reported by H. T. TAMPLIN, Esq., Barrister-at-Law.



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BRETT, L.J., in summing up the evidence to the jury, said it was necessary to prove that the accused had the will and intention, at the time, to kill the child. The jury must acquit if they were not satisfied that prisoner had in her mind the defined intention of killing her child.

A witness had proved that the prisoner, after throwing her child into the water, threw herself in, and, on being rescued, exclaimed, "save the child; let me die." It was also proved that since her confinement the prisoner had been strange in her behaviour, although she had always been a kind mother.

Referring to this part of the case, his Lordship told the jury that if they should be of opinion that the words used by the prisoner at the time were a true expression of her mind, they must return a verdict of not guilty.

The counsel for the prosecution having suggested that scientific evidence as to the prisoner's state of mind should be forthcoming, his Lordship said that it was a mistake to suppose that, in order to satisfy a jury of insanity, scientific evidence must be adduced. If the evidence of facts were such as to indicate an unsound state of mind that was quite sufficient.

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## WESTERN CIRCUIT.

### BRISTOL AUTUMN ASSIZE.

*Wednesday, November 6.*

(Before Lord COLERIDGE.)

REG. v. BROWN. (a)

*An accessory before the fact—Accessory cannot be present at the commission of the offence.*

**F**REDERICK BROWN was indicted for murder, his wife being also indicted as an accessory before the fact. It was proved that the blow, which proved fatal, was struck within a few feet of where the wife was standing.

COLERIDGE, L., directed the acquittal of the female prisoner, pointing out that she should have been indicted as a principal, if anything. An accessory before the fact must be absent at the time when the crime is committed, and the act must be done in consequence of some counsel or procurement of his.

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(a) Reported by H. T. TAMPLIN, Esq., Barrister-at-Law.

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### HIGH COURT OF JUSTICE.

#### COURT OF APPEAL.

*Nov. 28 and 29, and Dec. 2, 1878.*

(Before BALL, C., PALLES, C.B., and DEASY, L.J.A.)

HEGARTY *v.* SHINE. (a)

*Assault—Infecting with venereal disease—Consent of woman to immoral act—Concealment of infection.*

*In an action for assault, the plaintiff, who was living as paramour with the defendant, became infected by him with a venereal disease. The defendant concealed from her the fact of his being so infected.*

*Held, affirming the decision of the Queen's Bench Division (reported ante, p. 124) that the action would not lie. Mere concealment of the defendant being infected did not constitute such a fraud as to vitiate the consent of the woman to the immoral act. A Court of Justice will refuse to entertain a civil action arising from immorality. Semble per Pallets, C.B. (R. v. Bennett, 4 F. & F. 1005, and R. v. Sinclair, 13 Cox C. C. 28) were rightly decided.*

**A**CTION for assault and breach of promise of marriage. The facts and arguments appear sufficiently reported *ante* (p. 124).

The decision of the Court of Queen's Bench Division, ordering a new trial, was now appealed against.

*Heron*, Q.C. (with him *Ronan*), for the appellant, the plaintiff.

*James Murphy*, Q.C. (with him *Exham*, Q.C. and *O'Riordan*) for the respondent, the defendant.

*Cur. adv. vult.*

**BALL, C.**—This action is brought by a female plaintiff against a male defendant for—(1) breach of promise of marriage; (2),

(a) Reported by **CHARLES R. ROCHE**, Esq., Barrister-at-Law.

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infection.*

assault of the plaintiff and infecting her with venereal disease, the second ground of complaint being stated in two counts, of which the first is expressed that the defendant assaulted and beat the plaintiff, whereby she became infected with venereal disease, and the second, that the defendant assaulted and beat the plaintiff and infected her with venereal disease. Of the first cause of action for breach of promise of marriage, there was upon the trial of the action no evidence. The rest of the complaint was founded upon the following facts. Between the plaintiff and the defendant there had for about two years subsisted an illicit intercourse, and, during its continuance, the plaintiff contracted from the defendant disease. As the questions to be decided by us arise upon the charge of the learned judge before whom the trial took place, in respect of the legal considerations applicable to a case of this character, I think it unnecessary to enter into the details of the evidence. There was a verdict for the plaintiff; but, if the jury were misdirected, of course it cannot be upheld. The charge is reported by the learned judge in the terms which I shall now state: "I charged the jury, carefully reviewing the evidence, without expressing any opinion on my own part. I adopted as law and as applicable to a civil action, the case of *Reg. v. Bennett* (4 F. & F. 1105) and *Reg v. Sinclair* (13 Cox C. C. 28), and I in substance directed the jury, as matter of law, that an assault implied an act of violence, committed upon a person against his or her will, and that, as a general rule, when the person consented to the act, there was no assault; but that if the consent was obtained by the fraud of the party committing the act, the fraud vitiated the consent, and the act became in view of the law an assault, and that therefore if the defendant, knowing that he had venereal disease, and that the probable and natural effect of his having connection with the plaintiff would be to communicate to her venereal disease, fraudulently concealed from her his condition, in order to induce, and did thereby induce, her to have connection with him; and if but for that fraud she would not have consented to have had such connection; and if he had with her the connection so procured and thereby communicated to her such venereal disease, he had committed an assault, and one for which they might on the evidence award substantial damages." This charge, and the objections to it, were brought before the Queen's Bench Division, when a majority of the judges held that the views presented by the learned judge to the jury (not, indeed, according to his own opinion, but in deference to the authority of the two cases in the Criminal Courts cited by him) were a misdirection, and they consequently awarded a new trial upon this ground. The propriety of their ruling we have now to examine. The charge of the learned judge assumes that, in order to constitute an assault upon a person, the act done should be against his or her will, without his or her consent. With that proposition I entirely agree. To strike a person minaciously or in anger is a matter very different in character from a blow in

sport or play. Sexual intercourse with the consent of the female (supposing no grounds to exist for holding the consent inoperative) cannot be an assault on the part of the male. The charge then proceeds to assert that, although consent be given, yet if that consent was obtained by the fraud of the party committing the act, the fraud vitiated the consent and the act became in view of the law an assault. From this proposition when laid down in reference to the particular facts of the present case I dissent. We are not dealing with deceit as to the nature of the act to be done, such as occurred in the case cited in argument, of the innocent girl who was induced to believe that a surgical operation was being performed. There was here a lengthened cohabitation of the parties, deliberate consent to the act or acts out of which the cause of action has arisen. If deceit by one of them as to the condition of his health suffices to alter the whole relation in which they otherwise were to each other, so as to transform the intercourse between them into an assault on the part of the defendant, why should not any other deceit have the same effect? Suppose a woman to live with her paramour under and with a distinct and reiterated promise of marriage not fulfilled, nor, it may be, intended to be fulfilled, is every separate act of intercourse an assault? Let the same happen in conjunction with a broken engagement to provide for her maintenance and protection against poverty, does a similar consequence here also follow? No one, I think, would be prepared to answer these questions in the affirmative. In the present case the fraud relied upon to annul the plaintiff's consent is the concealment of a fact which, if known, would have induced her to withhold it. But before this effect is attributed to such a concealment, it seems to me reasonable to demand, what is required in contract, that from the relation between the parties there should have arisen a duty to disclose capable of being enforced. And how can this be when the relation is itself immoral and for the indulgence of immorality, and the supposed duty for the object of aiding its continuance? To support obligation founded upon relation, it appears to me the relation must be one which we can recognise and sanction. I do not think these opinions conflict with the cases in Criminal Courts referred to by the learned judge in his charge. Considerations affect prosecutions not applicable to civil actions. In the former, we are concerned with public interests and consequent public policy, in the latter, with the reciprocal rights and liabilities of individuals. Mutual consent to a prize fight might prevent the pugilists having a remedy *inter se*, but would not make it less a breach of the peace or exonerate those engaged from punishment. These reasons in my opinion justify the order of the Queen's Bench Division directing a new trial upon the ground of misdirection by the learned judge. I think it right to add that I also concur with the majority of that Court in holding that an action of this character cannot be maintained. The consequence of an immoral act—the direct consequence—is the

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subject of complaint. Courts of justice no more exist to provide a remedy for the consequences of immoral or illegal acts and contracts than to aid or enforce those acts or contracts themselves. Some striking illustrations of this are afforded by authorities cited in the argument of this appeal. Thus judges have refused to partition the plunder obtained by robbery; protect property in an indecent book or picture; to compel payment of the wages of unchastity. Are the same tribunals to regulate the relation, rights, and duties of the parties to an illicit intercourse? No precedent has been cited, no authority suggested, for an action like the present, and I am not disposed to make, in the interest of immorality, either precedent or authority for it.

PALLES, C.B.—The difference of opinion in the Court below, and the fact that the reasons of that judgment involve dissent from *Reg. v. Bennett* and *Reg. v. Sinclair*, invest this case with some importance. It is for this reason that, though concurring, as I do, with my Lord Chancellor that the appeal ought to be dismissed, and agreeing generally with his reasons, I think it right to indicate generally the lines of thought through which I have arrived at this conclusion. Three of the questions argued, and ably argued, by the plaintiff's counsel are, in my view, outside the sphere of serious controversy. I refer, first, to the effect of consent upon an act which would otherwise have been an assault; secondly, to the operation of the traverse in putting in issue the alleged consent; and thirdly, to the alleged admission by pleading that the infecting charged in the second count was against the plaintiff's will. It is indisputable that an act cannot be an assault unless it be against the will of the person assaulted. Such was the undoubted law long before the case of *Christopherson v. Beare*. In that case, the passage from Bullen's *Nisi Prius*, said to be to the contrary, was cited and relied upon, and, if it bear the interpretation contended for by the plaintiff here, it is by that case denied to be law. The same proposition determines the next point. As the allegation of assault includes a statement that the act complained of was against the will of the plaintiff, so a traverse of that allegation puts in issue as well the plaintiff's will as the commission of that which, but for her will, would have been an assault. As to the last point, admitting that Mr. Ronan is right in saying that in the second count the infecting is laid as a substantive trespass, it can be so only by impliedly alleging that act to have been against the plaintiff's will, and, if so, the traverse puts in issue the fact so impliedly averred. Passing from these subsidiary points to the main question in the case, two propositions have been advanced on the part of the plaintiff, first, that there was evidence that she did not consent in fact to the act constituting the cause of action, and, secondly, that if she did consent, there was evidence that the consent was procured by fraud. Unless she can establish either one of these contentions the present appeal must fail. I cannot entertain any doubt that the plaintiff must, in law, be taken to have consented in fact to

the act constituting the alleged trespass. In reference to this, which I deem a cardinal question to the right decision of this case, I abstain from referring to any matter of form. I assume the alleged trespass to be pointedly laid as a substantive trespass. I also assume that which I much doubt, that the construction is open upon the direction at the trial which the plaintiff is here to support. Apart from matters of form, the case is, that the plaintiff consented to have sexual intercourse with an individual who then, but without her knowledge, was affected with this foul disorder, and that the physical contact thus consented to communicated the disorder to the plaintiff. I shall not enter into any refinements, I care not whether one act is the consequence of the other, or whether each is a separate act, which, but for the plaintiff's consent, would have been a separate assault. I hold that the consent proved must, in law, be taken to extend to both. That which the plaintiff consented to involved the communication of the infection, and in consenting to the former she consented to the latter. Such a case is wholly distinguishable from *Reg. v. Locke* (2 C. C. R. 10) and *Reg. v. Flattery* (13 Cox C. C. 388). In the former, there was not a consent to anything, not an exercise of a positive will; there was a submission, but nothing more. In the latter the plaintiff consented to a surgical operation, in no sense did she consent to the prisoner having connection with her. I have the satisfaction of believing that upon this part of the case my view is not in conflict with that of the Lord Chief Justice. No doubt, after putting the case of a surgeon using a poisoned instrument, the learned judge says: "Could he not establish that to such an operation, involving such consequences, he did not consent, though he did permit an operation of a different character?" The Chief Judge had, however, immediately previously stated his view of the law, of which he gave that as an example. "It appears to me," he says, "that the doctrine laid down by Mr. Justice Willes and other judges in England, that consent procured by fraudulent concealment is void in point of law, is applicable to an action like the present, before a civil tribunal." And, again, at the end of his judgment, he bases his conclusion that the wrong was done without the plaintiff's consent, upon the authority of the cases which he had previously referred to, every one of which—viz., *Reg. v. Bennett*, *Reg. v. Saunders*, and *Reg. v. Williams*—was a case of consent in fact held to have been avoided or vitiated by fraud. Being, then, of opinion that the alleged trespass was an act done with the consent in fact of the plaintiff, the next inquiry is, was that consent avoided or vitiated by fraud? Now I may at once say that I am not prepared to overrule the long line of cases which establish that consent may be avoided by fraud. It is familiar to us all that a contract procured by fraud may be avoided by the innocent party, unless such a change of circumstances has supervened as renders it impossible to re-instate the parties in the state in which they were before the con-

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tract. I see no good reason why the same principle should not be applicable to a bare consent, although it lack the other incidents of a binding contract; nor do I see why the principle should not be pushed to the extent of converting into an assault that which was in fact the subject of a consent procured through fraud. *Reg. v. Saunders* (8 C. & P. 265) and *Reg. v. Williams* (*Ibid.* 286), decided upwards of forty years ago, depended for their validity upon this application of the principle; and in relation to the question now in hand, these cases have been not only since uniformly followed, but have been recognised in the Court for Crown Cases Reserved in *Reg. v. Case* (1 Den. C. C. 580). But in my opinion it is not necessary for the purpose of this case to consider whether the doctrine that consent may be avoided by fraud does or does not apply in the case of a prosecution as distinguished from a civil action to an agreement for immoral sexual intercourse. The difficulty which has presented itself to my mind as to the decision in *Reg. v. Bennett* is not in relation to the general question whether the doctrine is applicable to such a case, but whether in that case there was evidence of fraud. It does not appear by the report that there was evidence of active misrepresentation, and in my opinion, where concealment is relied upon as fraud, for the purpose of avoiding a contract or consent it is not sufficient to show that such concealment was wilful or even for the purpose of deceit, unless a duty be shown to communicate the fact concealed to the party who has been deceived. For this reason, in criminal prosecution for constructive assaults, relying upon a consent in fact having been avoided by fraud, it appears to me to be impossible to rely upon concealment alone, where the act knowingly consented to was an immoral one. In such a case the sole relation between the parties from which it can be said that a duty to communicate arises, is that they have agreed together to commit an act of immorality. From such a relation, illegal and immoral in itself, no duty can arise, and in the absence of such duty, the concealment (although intentional and with a view to deceive), of a material fact, is in my opinion neither fraud nor evidence of fraud. This applies as well to a criminal prosecution as to a civil action. I desire, however, to guard myself against being supposed to decide that, if there be active misrepresentation by which a party is induced knowingly to consent to an immoral act, that false representation may not amount to a fraud sufficient in a criminal prosecution to avoid the consent and render the guilty party indictable for the act as if there had never been a consent. If such an act were an assault, I do not think that the maxim *Ex turpi causa non oritur actio* would apply to a prosecution. If the misrepresentation be sufficient to deprive the acquiescence of its character of assent, the act of the defendant may be relied on as an assault. It appears to me that the decision of this case in the Queen's Bench Division may be taken as overruling the decision in *The Queen v. Bennett*. I consider it a matter of such grave importance to interfere with

decisions as to assaults upon females, that I wish to say that, on the grounds I have stated, I think that case is distinguishable; so that, if the Queen's Bench decision is to be taken as overruling that case, I may not be taken as concurring in it. I base my judgment upon the ground that this cause of action arises out of an immoral and illegal transaction. It is a typical illustration of the maxim quoted at the bar, *Ex turpi causa non oritur actio*. A distinction was attempted to be made at the bar between the application of this principle to actions in tort and in contract, but there are many actions in tort to which it is undeniable that this principle cannot apply; for instance, if a prisoner in custody attempts to escape and the officer in whose custody he is in recapturing him unnecessarily inflicts upon him a serious wound, an action will lie against the officer, although the act of the prisoner was an illegal one. But it is one thing to say that this maxim may not apply in some cases of wrong, and it is another to say that a Court of Justice is bound to measure the wrong done and to mete out the wages of iniquity. I think a Court of Justice is bound to say that such a contract is void for immorality. We have been told that there is a legal obligation on a Court to go into the details involved in this immoral contract. I emphatically deny that. Whether in the form of contract or tort, an action in a Court of Justice will not lie on such a transaction, nor can it be pleaded as a matter of defence. In answer to such an action, I think the immoral nature of the contract ought to be pleaded; and it generally must be so. But if that opportunity be passed over, I will not undertake to say that it is not in the power of the judge at the trial to direct that the plaintiff be non-suited. In the present case there was, I think, no necessity of pleading this defence. An action is brought for trespass to the person. That is denied and accordingly the plaintiff must show that an assault was committed. The evidence proves that the act was done by the consent of the plaintiff and therefore that she was not assaulted. In order to avoid the consent, she relies upon the fraud. She asks the Court to relieve her from the consequences of a consent which she in fact gave. This is not open to her, because if the contract be an immoral one, neither party can be allowed to enter into the consideration for it, whether to sustain the cause of action or to avoid the consent. The Court should say we decline to go into it, therefore the consent must stand unaffected by the alleged fraud.

DEASY, L.J.A.—I quite concur in the judgments pronounced by the Lord Chancellor and the Lord Chief Baron. But for the novelty and importance of the case, I would confine myself to simple concurrence. No such action as this has ever been brought either in England or this country. The circumstances of the plaintiff are so pitiable that they must necessarily excite compassion in the breast of every man; but I think that if, yielding to that compassion, we were to hold such an action to be maintainable we would be laying down a new and dangerous

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precedent. If, after a course of illicit intercourse extending over two years, a party should bring an action such as the present, we should, I fear, unfortunately have the time of the Courts of Justice taken up by large numbers of plaintiffs coming in to sue their partners in sin. Such actions I think to be contrary to public policy, morality, and decency. The two cases cited to us before Willes, J., and Shee, J., are peculiar, but I think we can find in them no authority that consent to an act of immorality can give a right to bring an action for assault on the part of the individual who has given the consent. In this case the woman had been living for years in immorality. But many other cases may be put in which the woman may be innocent. Take, for example, the case of a woman who has been seduced under a fraudulent promise of marriage; could it be held that, though her consent was obtained by fraud, she could maintain an action against her seducer for assault? Again, take the instance of a woman who is perfectly innocent when she contracts a bigamous marriage. There she submits to the embraces of the man who has gone through the form of marriage with her without the least culpability on her part, solely induced by the fraudulent act of the man; but has it ever been held that on such a state of facts the woman could bring an action against him for assault? In the present case the woman has led an immoral life—a life, one of the frequent consequences of which is the contraction of a loathsome disease. For two days a most able judge and a jury have been engaged in investigating the details and occasions of this course of immorality, in order to discover whether the probable consequence of that course of immorality did actually originate from it. I am of opinion that such an investigation is no fit subject for the attention of a Court of Justice, and that no such investigation ought to receive judicial sanction. According to the judgment of this Court, therefore, there must be a new trial, if the plaintiff is advised to go on with the suit.

*Order of the Queen's Bench Division for a new trial affirmed.*

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## HIGH COURT OF JUSTICE.

## EXCHEQUER DIVISION.

Dec. 2 and 3, 1878.

(Before KELLY, C.B. and HUDDLESTON, B.)

*Re* ALEXANDRE TERRAZ AND THE EXTRADITION ACTS, 1870  
AND 1873. (a)

*The Extradition Acts, 1870 and 1873 (33 & 34 Vict. c. 52, ss. 8, 10, and schedule; 36 & 37 Vict. c. 60, s. 1, and schedule)—Extradition crimes enumerated in schedule—"Crimes against bankruptcy law"—Apprehension of foreigner in England on warrant charging the commission of "crimes against bankruptcy law" in foreign country—Sufficiency of that description of the offence—Habeas corpus—Second warrant lodged after rule nisi for writ granted—Competency of Court to consider validity of second warrant on argument of rule—Right of prisoner's counsel to see warrant.*

*The first schedule to the Extradition Act 1870 (33 & 34 Vict. c. 52) enumerates (amongst other "extradition crime") "crimes by bankrupts against bankruptcy law;" and by the Extradition Act 1873 (36 & 37 Vict. c. 60), sect. 8, and schedule, that description is enlarged to "any indictable offence under the law, for the time being in force in relation to bankruptcy, which is not included in the first schedule to the principal Act;" and the Extradition Treaty of 1874, between this country and Switzerland, specifies in article 21, amongst other extradition crimes, "crimes against bankruptcy law."*

*Under a warrant, issued on the 12th day of November by the chief magistrate at Bow-street for the apprehension of T., a French subject, charging him with "the commission of crimes against bankruptcy law within the jurisdiction of the Swiss Confederation." T. was apprehended in London on the 18th day of November, and remanded by the magistrate to the 25th, and again on that latter day to the 29th day of November for further inquiry. On the 26th day of November a rule nisi was obtained for a habeas corpus on the ground that the warrant did not set forth the nature of the offence, and otherwise was not good; and*

(a) Reported by H. LEIGH, Esq., Barrister-at-Law.

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*on the 26th day of November a fresh warrant, charging the offence more specifically and in detail, was issued and lodged with the gaoler, but was not known to or seen by the prisoner's counsel until the argument on the rule came on in court.*

*Held by the Exchequer Division (Kelly, C.B. and Huddleston, B.), discharging the rule, that the description of the offence charged in the warrant of the 12th day of November, being in the very words of the Extradition Acts, 1870 and 1873, was sufficiently specific, and that the warrant was good, and justified the apprehension of the prisoner and his detention for further inquiry before the magistrate.*

*By Kelly, O.B.—Had the case turned upon the validity of the second warrant of the 29th day of November, it would have been a violation of the first principles of the law and constitution to decide it until the prisoner's counsel had seen the warrant, and had full opportunity of preparing himself to argue upon it before the Court.*

*Huddleston, B., contra, was of opinion that, both in practice and on authority, a second warrant might be lodged and substituted for the original warrant, and that on the argument of a rule like the present the whole question might be gone into, and the validity of the second warrant, whether issued before or after the rule was obtained, or even at the very moment the prisoner was brought up, might be discussed and decided, the question being whether the prisoner is, at the moment the rule is being argued, entitled to be discharged. Nor can his counsel claim a right to see the warrant, though it may be very convenient that he should have an opportunity of seeing it.*

**T**HIS was a rule *nisi* for a writ of *habeas corpus*, directed to the keeper of the Middlesex House of Detention, to bring up the body of one Alexander Terraz, a French subject, who had been apprehended on a warrant under the Extradition Act 1870 (33 & 34 Vict. c. 52), under the following circumstances:—

On the 12th day of November, 1878, Sir James Ingham, the chief magistrate at Bow-street, on the sworn information of the Swiss Consulat-General in London, issued his warrant of that date, under his hand and seal, directed to all and each of the constables of the Metropolitan Police Force, setting forth that it had been shown to the said chief magistrate that Alexandre Terraz, late of Locle, was accused of "the commission of crimes against bankruptcy law within the jurisdiction of the Swiss Confederation," and commanding them in Her Majesty's name forthwith to apprehend the said Alexandre Terraz, and to bring him before the said chief magistrate, or some other magistrate sitting at Bow-street, to be further dealt with according to law; and on the same day the said Sir James Ingham duly forwarded to the Home Secretary information of his having issued such warrant under sect. 8 of the

Extradition Act, 1870, and also a certified copy of the information on which the warrant was founded.

On the 18th day of November the said Alexandre Terraz was arrested within the Metropolitan Police District, and taken the same day before Sir James Ingham and remanded to the 25th day of November, on which day he was again brought before Sir James Ingham, and again remanded to Friday, the 29th day of November.

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On the 26th day of November a rule *nisi* was obtained in this court by *Atherley Jones*, on behalf of the prisoner, calling upon the Solicitor to the Treasury and the keeper of the Middlesex House of Detention to show cause, peremptorily, on Friday, the 29th day of November, why a writ of *habeas corpus* should not issue directed to the said keeper, commanding him to have the body of the said Alexandre Terraz before the court, "on the ground that the warrant does not set forth the nature of the offence, and otherwise is not good."

Meanwhile, further information having been received at the Foreign-office from the Swiss Consulate, together with the warrant of arrest for the crime of "fraudulent bankruptcy" issued against the accused in Switzerland and the evidence in support of the accusation, the Home Secretary on the 25th day of November issued his order to Sir James Ingham under the Extradition Act, 1870, in the form given in the schedule to the Act, requiring him to issue his warrant for the crime of "fraudulent bankruptcy."

Accordingly Sir James Ingham issued a warrant on the 29th day of November under his hand and seal, directed to all and each of the constables of the Metropolitan Police Force, by which, after stating that requisition had been made for the surrender of Alexandre Terraz, accused of "the commission of crimes by a bankrupt against bankruptcy law, that is to say, for that he, having been adjudicated a bankrupt, unlawfully did not deliver up to the trustee administering his estate for the benefit of his creditors, or as he directed, all such part of his real and personal property as was in his custody or under his control, and which he was required by law to deliver up, within the jurisdiction of the Swiss Confederation," the said Sir James Ingham commanded them in Her Majesty's name forthwith to apprehend the said Alexandre Terraz, pursuant to the Extradition Act 1870, and bring him before him, or some other magistrate sitting in Bow-street Police-court, to show cause why he should not be surrendered in pursuance of the said Extradition Act.

The following are the sections of the Extradition Acts, 1870 (33 & 34 Vict. c. 52) and 1873 (36 & 37 Vict. c. 60), and the articles of the treaty of 1874 between Her Majesty and the Swiss Confederation "for the mutual surrender of fugitive criminals," which were relied on and discussed in argument and referred to in the judgments of the court as material.



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The Extradition Act of 1870 (33 & 34 Vict. c. 52) enacts as follows :

By sect. 7 it is enacted that if requisition be made to a Secretary of State by a diplomatic agent of any foreign State for the surrender of any fugitive criminal of such foreign State, who is, or is suspected to be, in the United Kingdom, a Secretary of State may, by order under his hand and seal, signify the same to a police magistrate, and require him to issue a warrant for the apprehension of such fugitive criminal. But if the offence is, in the Secretary of State's opinion, of a political character, he may refuse to send any such order, and may order such fugitive criminal to be discharged from custody.

Sect. 8. A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected to be in the United Kingdom, may be issued—

1. By a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would, in his opinion, justify the issue of the warrant if the crime had been committed and the criminal convicted in England ; and
2. By a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint and such evidence or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed in that part of the United Kingdom in which he exercises jurisdiction.

Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to a Secretary of State, who may, if he thinks fit, order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged.

A fugitive criminal, when apprehended on a warrant issued without the order of the Secretary of State, shall be brought before some person having power to issue a warrant under this section, who shall by warrant order him to be brought, and the prisoner shall accordingly be brought, before a police magistrate.

A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as, with reference to the circumstances of the case, he may fix, receives from a Secretary of State an order signifying that a requisition has been made for the surrender of such criminal :

### Sect 10 :

In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, *and such evidence is produced as would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England*, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

### Sect. 11 enacts that

If the police magistrate commits a fugitive criminal to prison he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*.

The first schedule to the Act of 1870 is as follows :

#### *List of Crimes.*

The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act.

Here follows an enumeration of various crimes, and amongst them is the following :

"Crimes by bankrupts against bankruptcy law."

The Extradition Act, 1873 (36 & 37 Vict. c. 60), amending the Act of 1870, and with which it is to be construed as one, enacts :

Sect. 1. The principal Act shall be construed as if there were included in the first schedule to that Act the list of crimes contained in the schedule to this Act.

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The schedule to the Act of 1873 contains in the list of crimes the following amongst others :

Any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the principal Act.

The following are the material articles of the Treaty of 1874 between Her Majesty and the Swiss Confederations :

Article II.—The crimes for which the extradition is to be granted are the following: . . . .

(7.) Crimes against bankruptcy law.

Article X.—A fugitive criminal may, however, be apprehended under a warrant issued by any police magistrate, justice of the peace, or other competent authority in either country, on such information or complaint, together with such evidence or after such judicial proceedings as would, in the opinion of the officer issuing the warrant, justify its issue if the crime had been committed in that part of the dominions of the two contracting parties in which he exercises jurisdiction. Provided, however, that in the United Kingdom the accused shall in such case be sent as speedily as possible before a police magistrate in London. Such requisition (the requisition for extradition mentioned in Article IX.) to be made by the respective diplomatic representatives of the two countries may be made by means of the post or by telegraph.

Dec. 12.—The *Attorney-General* (Sir J. Holker, Q.C.) and *C. S. Bowen* for the Crown, and *H. D. Greene* for the Swiss Government, showed cause against the rule, and in doing so,

The *Attorney-General*, for the Crown, contended that the first warrant of the 12th day of November was valid and good for the purpose for which it was issued—viz., apprehension with a view to further inquiry, and that the prisoner was lawfully in custody under it by virtue of sect. 8 of the Extradition Act, 1870 (33 & 34 Vict. c. 52). The treaty of 1874 between England and Switzerland, "for the mutual surrender of fugitive criminals," enumerates in Article II. of the treaty the several crimes for which extradition is to be granted, and amongst them, as the seventh in the list, will be found, "Crimes against bankruptcy law," and the list of extradition crimes set forth in the first schedule to the Extradition Act, 1870, contains the following, amongst others, "Crimes by bankrupts against bankruptcy laws." The warrant uses the very words of the treaty and Act of Parliament, and although for so doing it is objected to on behalf of the prisoner as being too general and not sufficiently specific, the Crown contends that it is amply sufficient and good. Moreover, to avoid all possible doubt and difficulty on the point, a fresh warrant was lodged on the 29th day of November, charging the offence more specifically, under which fresh warrant the prisoner is now

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in custody. And the Extradition Act, 1878 (36 & 37 Vict. c. 60), amending the Act of 1870, and with which "it is to be construed as one," contains in the list of crimes in the schedule the following: "Any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the principal Act." Thus any defect, if there be any, in the Act of 1870 is cured. This warrant does not require the same specific particularity in stating the crime as a warrant of commitment, it being simply to bring the accused before the magistrate for further inquiry. [HUDDLESTON, B., refers to *Rex v. Gourley* (7 B. & C. 669), as showing that such a warrant, in the words of Lord Ellenborough, C.J., "ought not to receive so strict a construction as a warrant in execution."] In Jervis's Act (11 & 12 Vict. c. 42), sects. 9 and 10, it is expressly provided that no objection shall be taken or allowed to the warrants of justices therein mentioned, for any alleged defect therein in substance or form. [KELLY, C.B.—My impression is, that that Act has no application to the present case.] Apart from that Act, without admitting its non-applicability, this warrant is good, and the man being in custody under it the court will not discharge him (*Ex parte Scott*, 9 B. & C. 446). Hale, C.J., in 2 P. C. 110, says, that "regularly the warrant ought to contain the cause specifically, and should not be generally to answer such matters as shall be objected against him;" but he goes on to say that such a general warrant is not therefore void, but if *de facto* the matter be within the justice's jurisdiction, it is a good justification. Now this warrant is much more specific than that, and *à fortiori* therefore is good. [HUDDLESTON, B., refers to *Rex v. Despard* (7 Term Rep. 736), in which a warrant to arrest for "treasonable practices" was held good.] Further, it is open to the authorities to proceed against him on a fresh warrant: (*Re Tivnan*, 5 B. & S. 645; s. c. nom. *Re Ternan*, 33 L. J. 201, M. C.) It was there argued that the warrant of the magistrate was bad for not showing that the witnesses had been examined on oath, but Blackburn, J., said: "Suppose the magistrate's warrant defective in this respect, it could be cured by a fresh warrant. We would not discharge on *habeas corpus* for such a reason." So in *Ex parte Smith* (3 H. & N. 227; 27 L. J. 340, Ex.), where the first warrant on a conviction under 11 & 12 Vict. c. 43, sect. 5, was bad, this court (Martin, Bramwell, and Channell, BB.) allowed a second warrant to be substituted for it, on a return to a *habeas corpus*. I submit that the first warrant is good, but if not, the Court would not grant this writ, there there being an undeniably good fresh warrant lodged with the gaoler. [KELLY, C.B.—But which, for anything that appears, the prisoner has never seen or heard of, and which the learned counsel who appears in support of the rule says that he never saw or heard of until this morning in Court.]

*O. S. Bowen* (on the same side).—Is the prisoner at this moment entitled to his discharge? That is the question; and

the answer I submit is clearly that he is not. I will confine my observations to the last point as to the second warrant. The learned counsel for the prisoner cannot narrow the ground by the way in which he frames his rule. Suppose there are five good grounds for detaining a prisoner, and a sixth supposed to be good, but which is in fact bad: is the prisoner's counsel to be allowed to move on the ground that the sixth ground is bad, and the Crown not to be allowed to show the five good ones? [HUDDLESTON, B. refers to *Ex parte Cross* (2 H. & N. 354; 26 L. J. 201, M. C.) as stating the rule of practice in such cases.] In that case, where a prisoner had been lodged in gaol under a bad warrant of commitment, a good warrant subsequently delivered to the gaoler, but before a rule for a *habeas corpus*, was held a good answer to that rule, which the Court discharged, on the authority of *Reg. v. Richards* and others (5 Q. B. 926), Martin, B. saying; "What would be the use of granting the writ if the second warrant would be a good return to it?" [KELLY, C.B.—In that case the new warrant was drawn up before the rule was obtained.] In practice warrants are not served on prisoners. But further, in *Ex parte Dauncey* (8 Jur. 829) in this Court, where, after a rule for a *habeas corpus* had been granted, a warrant was issued which rendered the custody lawful, the Court discharged the rule, Parke, B. saying, in delivering judgment: "Whether the bankrupt was properly in custody between his examination by the Bankruptcy Commissioner and his detention under the warrant, it is unnecessary to decide; the only question, when we are called upon to issue a *habeas corpus*, as we are at present, being to see whether his imprisonment is now a legal one, and we think it is." That case is dead in point. The Court there declined to discuss the first warrant, and held the man to be legally in custody under the second. The case of *Re W. Bull* (15 L. J. 234, Q. B.) is also an authority precisely in point, and in favour of the Court's acting, if necessary, on the second warrant. The practice in such cases is laid down in Chitty's General Practice of the Law, vol. 1, p. 693 (see note to *Ex parte Cross, ubi sup.*) The Court will not go through the idle ceremony of granting the writ to which the second warrant would be an immediate and conclusive answer.

*H. D. Greene* showed cause for the Swiss Government.—The rule does not show for what purpose the prisoner is to be brought up, nor that he is illegally detained, nor is there any suggestion in these affidavits or elsewhere that the detention is illegal. That the arrest was illegal (if it were so) is not sufficient. The court will not make the rule absolute unless satisfied that he is illegally detained. There is no necessity for stating any grounds at all, it being enough that the magistrate issues his warrant to bring the prisoner before him for further investigation. But even if the original warrant of arrest, or if even an original warrant of commitment were defective, that would be no ground for a *habeas corpus* whilst the prisoner was in custody on a fresh and

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perfectly good warrant. For this the following cases are authorities: *Re Phipps* (11 W. R. 730); there a rule *nisi* for the *habeas corpus* was obtained on the ground of the warrant of commitment not being properly sealed, and a second warrant was lodged with the gaoler after the rule was obtained similar in terms to the first, and purporting to be signed by justices of the same name, and being duly sealed; and the Court held, first, that if it were material they would assume that the second warrant was substituted by the same justices as an amendment of the first; and secondly, that the second warrant, though issued after the rule had been obtained, was a sufficient warrant to the gaoler for the prisoner's detention, and was an answer to the rule. So in *Rex v. Marks and others* (3 East, 157), it was held by Lord Ellenborough, C.J., and Grose, Lawrence, and Le Blanc, JJ., that, though a warrant of commitment for felony were informal, yet if the *corpus delicti* appear in the depositions returned to the court, they will not bail but remand the prisoner. From that time down to the case of *Ex parte Krans and others* (1 B. & C. 258), the practice was invariably to the same effect. In *Kran's* case, indeed, there was no warrant at all, the parties being detained on board a King's ship on a charge of smuggling and suspicion of murder; and on being brought up by *habeas corpus*, and it appearing by the return that they might be guilty, the Court of Queen's Bench (Abbott, C.J. and other judges) refused to discharge them, and remanded them to the marshal's custody for examination before the competent authority. These cases are conclusive of the present question. It must not be forgotten that the information in these cases is most generally furnished by telegraph in the swiftest possible way, and full details of the alleged offence are almost impossible to be had, and to require them would render the Extradition Acts almost nugatory. Moreover the application is premature; the time for it is after the magistrate has dealt with the case. Nor will the prisoner be prejudiced, for the Act of 1870 provides by sect. 11 an interval of fifteen days after the commitment within which he can apply for a *habeas corpus* before extradition takes place. The Court therefore will not interfere at this stage of the proceedings.

*Atherley Jones*, for the prisoner, *contra*, in support of his rule, could not pretend to argue the case on the point as to the second warrant at all satisfactorily, that warrant having only been brought to his notice since he came into court this morning. [*Bowen*, on behalf of the Crown, here offered to consent to the case standing over, in order to give time to the prisoner's counsel to consider the point respecting the second warrant; but *Jones* declined the offer, and elected to proceed with his argument.] The doctrine contended for against the prisoner would lead to a *reductio ad absurdum*. A perpetual series of warrants might be issued, and the prisoner practically be detained in perpetual custody. Until a warrant is served on a prisoner or brought to his notice, he cannot, it is submitted, be said to be in custody



under it ; and though he may be arrested on the second warrant, if discharged on the first, the second cannot now be set up as a ground for detaining him in custody. The cases cited on the other side are most of them on warrants of commitments. In *Ex parte Bull* and *Ex parte Phipps* no ground was stated on which the prisoners ought to be discharged, and it was therefore open to the Court in each case to enter into the reasons for detaining the prisoners in custody. As to the ground in the present rule, assuming that Jervis's Act (11 & 12 Vict. c. 42) applies, it nevertheless enacts (sect. 10) that the warrant "shall state shortly the offence on which it is founded ;" and, notwithstanding the proviso as to no objection being allowed for any defect in substance or form, that Act was not meant to, nor can it, make a bad warrant a good one. There are very old authorities to the effect that a warrant ought to state the offence specially, and not generally, "because," as Hale, in his *Pleas of the Crown*, vol. 2, p. 111, says, "it cannot appear whether it be within the jurisdiction of the justices, nor can it appear whether the party be bailable or not," for which he cites 2 Co. Inst., pp. 62, 591. So also Fortescue, p. 143 ; and in *Caudle v. Seymour* (1 Q. B. 889 ; 10 L. J., N. S. 130, M.C.) the law is laid down to the same effect. The warrant of arrest must show on its face some offence cognisable by and known to the law of England, such as "felony" or "misdemeanour," which might be good without being more specifically detailed. But there is no such crime known to our law as "crimes against bankruptcy law," and therefore the warrant is not good. By sect. 8 of the Extradition Act of 1870 a warrant is to be issued by a magistrate or any justice of the peace "on such information or complaint, and on such evidence, or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of it if the crime had been committed in that part of the United Kingdom in which he exercises jurisdiction." Can it be said that it would be competent for the magistrate to issue a warrant for the arrest of a man upon the allegation merely that he had committed a "crime against the Bankruptcy Act?" [HUDDLESTON, B.—The Extradition Act sets out a detailed list of crimes which shall be "extradition crimes," and amongst them we find "crimes against bankruptcy law" stated as one of them.] It is requisite that the warrant should state the commission of some particular offence, such as quitting, or attempting to quit, the country with money or property which ought to be divided among his creditors. The term in the Treaty of 1874 and in the Extradition Act, "crimes against bankruptcy law," is a generic description only of a certain class of offences known to the bankruptcy law, and is no more good as a description, in a warrant or an indictment, of an offence cognisable by the law than the allegation of an "offence against the bye-laws of a railway company" would be. This warrant shows no crime, and is therefore analogous or equivalent to a blank warrant, which is bad (1 Chitty Crim. Law

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110). He referred also to sect. 10 of the Extradition Act, 1870, and Article X. of the Treaty in support of his argument.

*Cur. adv. vult.*

*Dec. 3.*—The following judgments were now delivered:—

*KELLY, C.B.*—The question in this case is whether the prisoner, who, under the circumstances which I will very briefly allude to, was taken into custody, and in respect of whom an application has been made on behalf of the Swiss Government for his extradition, on the ground of an offence committed by him in Switzerland, which was said to be within the Extradition Acts, 1870 and 1873, is now lawfully in custody. The case was very amply and elaborately, as well as ably, argued before us on both sides yesterday. A great number of cases and authorities were cited, to more than one of which I do not think it is necessary, in the view that I take of the matter, to refer, and that is one bearing upon a particular point incidental merely to the principal question before us, because it appears to me that the whole case, as it is now before us, turns entirely upon the first warrant of the 12th day of November on which the rule *nisi* was moved, and which is alluded to in the affidavits upon which the rule was obtained; and to the effect therefore upon the case of that warrant, and that warrant only, I will now proceed to direct attention. It appears that the offence with which the prisoner is charged, and in respect of which his extradition is demanded by the Swiss Government, is described in the warrant in the following terms, namely: "That Alexandre Terraz, late of Locle, in Switzerland, is accused of the commission of crimes against bankruptcy law, within the jurisdiction of the Swiss Confederation." Now the question is whether that description of the offence with which he is charged is sufficient within the meaning of the statutes relating to extradition, or whether it is too general in its terms as not specifying any particular offence. Looking to the terms of the statutes, I am of opinion that no reasonable doubt can be entertained that it is sufficient, and that the magistrate was fully justified upon this warrant in imprisoning him, and remanding him until, upon further inquiry, the precise nature of the offence with which he was charged could be ascertained by evidence, and then the magistrate might be able to do whatever the statute required at his hands with regard to either discharging the prisoner or delivering him over under the Extradition Acts to the agents of the Swiss Government. Now, it is quite clear, not merely from the language of the statutes but also upon the first principles of law, that the warrant should sufficiently refer to the crime or crimes alleged to have been committed and in respect of which the imprisonment has taken place. When we look at the Act (33 & 34 Vict. c. 52), and particularly at the first schedule to it, we find a number of crimes specially enumerated therein; and they may be divided into two classes—

first, particular crimes described and specified in a single word even, and then another class of cases, in which it would be almost impossible properly and legally to specify the crime without entering into a lengthened definition or description of it, which would be inconvenient and cannot have been intended by the statute. The crimes mentioned in this schedule are, first, "murder." Here is a single word; in the case of a person charged with murder a single word is sufficient to describe the crime. So it is also with the crime of "manslaughter," which comes next. Then comes "counterfeiting and altering money and uttering counterfeit or altered money." That is a rather more expanded description, but still it is short, clear, and specific. Then "forgery, counterfeiting, and altering, and uttering what is forged, or counterfeited, or altered." Then again, "embezzlement and larceny, obtaining money or goods by false pretences." And then follow two descriptions of crime, as to either of which it would be exceedingly difficult and uncertain, and would lead perhaps to very perplexing questions as to the legality of the warrant, to attempt to express in legal language the entire description and definition of them. The first is "crimes by bankrupts against bankruptcy law," and next "fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force." Now, to define in legal language and in terms which would amount to a complete description of any offence, or one of many offences, which might have been committed, and which would be within the Extradition Acts and come within either of these two classes, would be exceedingly difficult; and therefore the Legislature seems to have authorised the description of this particular class by the general words, "crimes by bankrupts against bankruptcy law." I confine myself to this, as it is this and this alone that is now in question. Now a subsequent or, as I will call it, a second warrant of the 29th day of November has been brought before us, which, upon a ground which I shall presently mention, I do not conceive we could in the present state of the case legitimately or lawfully refer to, take into consideration, or act upon, and to which therefore I only now refer by way of illustration, because it informs us of what probably is really the crime for which the Government of Switzerland seek or demand the extradition of this alleged criminal. By that warrant we learn that it is in effect the disobedience to an order of one, whom in England we should call the trustee of the bankrupt's estate, to pay or deliver over any money or funds or property in the possession of the bankrupt to the court, in order that it might be distributed among his creditors. Now it is manifest that to put that charge into legal language, whether in England or Switzerland, would be very difficult indeed for those who had occasion at very short notice to obtain a warrant for the apprehension of an alleged criminal, and who would necessarily be

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required to act with great promptitude and celerity in such a matter, and therefore the Legislature intended, by the comprehensive mode in which these crimes are expressed or described in the schedule to the Act of 1870, to enable a party or foreign government, as it may be, at once to act upon it generally, leaving it to the magistrate or other authorities who have to deal with the case, upon evidence to be afterwards adduced before them, to determine whether it really be an offence against the bankruptcy law of Switzerland so far as such law is analogous, or, if it be so, identical with English law, with regard to the particular offence or crime charged against the criminal in question, so as to justify his extradition. The Legislature having described it in this general form, "Crimes by bankrupts against bankruptcy law," it appears to me that the description in the warrant is sufficient. Any doubt about it would, I think, be obviated, and the objection to the extradition under this proceeding be answered, by the case of *Ex parte Krans and others (ubi sup.)* cited by Mr. Greene. It is the only one of the numerous authorities that were cited to which I shall refer, but it is decisive upon the question of the description of the crime in the warrant, where the warrant is not upon conviction or judgment, in which cases the crime cannot perhaps be too specifically and fully stated; but in the case of a warrant that merely justifies, or claims to justify, the imprisonment of a party charged with an offence until further inquiry shall decide whether or not he is to be committed for trial or, it may be, summarily convicted, or otherwise dealt with according to law, such a general statement is sufficient. The marginal note of that case is to this effect: "Where persons detained, without any warrant, on board one of His Majesty's ships of war, on a charge of smuggling, and on suspicion of murder, were brought up by writs of *habeas corpus*, and it appeared by the return to those writs and to a *certiorari* which issued at the same time, that the prisoners might be guilty of the offences imputed to them, the Court refused to discharge them out of custody, and committed them to the custody of the marshal in order that they might be taken before some competent authority to be examined touching the matters contained in the returns, and to be further dealt with according to law." The language of Lord Tenterden is conclusive upon the point, that where it is a case in such a condition as that there must be further inquiry, and which further inquiry requires the continued imprisonment of the party charged, then he must be remanded, and if a *habeas corpus* be obtained he is not to be discharged, but be remanded back to the same custody for the purpose of the further necessary inquiry, in order that he may either be put upon his trial or discharged, according to the result of the inquiry, which should take place before a competent authority. This case, therefore, clearly shows that the general charge, that this prisoner has "committed crimes against bankruptcy law," is one that requires further inquiry. The next step

to be taken is the examination into the charge upon evidence before the magistrate. Were we to deal with this case, as we might, I think, under existing circumstances do, exactly as if the prisoner were now before us on *habeas corpus*, and this warrant and the same matter as now appears before us (in relation I mean to the first warrant) were brought before us, the result would necessarily be—the warrant not being upon a conviction or judgment, but one merely authorising apprehension and detention in prison until the prisoner's conduct in respect of the alleged crime could be further inquired into, and it could be determined upon the evidence whether he should be delivered over to the Swiss Government or be discharged out of custody—the result, I think, would necessarily be, that he would be remanded in custody for the purpose of such further inquiry. Under these circumstances, although I do not say that the case is by any means free from difficulty, because there is no specific offence and no specification of any particular offence, which enables us at once, upon looking at the warrant itself, to determine whether it is an offence so analogous to one of the several offences against our own bankruptcy law as to justify or call for the extradition of the accused, yet, as I find that the language of the statute, upon which I have already observed, shows it to have been intended that a description of the offence in the warrant taken from the very words of the Act should be sufficient to justify and call, not for the extradition, but certainly the apprehension of the accused, and his detention for further inquiry, I think that under this warrant the prisoner must be remanded into the custody of the law until it be determined upon further inquiry whether his extradition is to take place, or whether he is to be set at liberty and discharged. I confine my judgment entirely to that point, but I cannot conclude it without saying most emphatically that, if the case had turned upon or it had been necessary to refer to or to rely at all upon the second warrant, I should have thought it a direct violation of the first principles of the law and constitution of this country to deal with that warrant in any way, or to take into consideration the question of its validity, unless the counsel for the accused had had an opportunity previously of seeing it, and preparing himself to argue upon it before us. Cases have been cited and practice has been alluded to, but I care not what the practice may have been, or what may have been determined in any case. I am certain there is no case reported as having been decided in Westminster Hall, which would authorise the imprisonment of one of the subjects of the realm, or any other person, under a warrant the contents and nature of which had never previously been seen by or made known to the accused or his counsel, and the validity of which warrant, upon which depended the question whether the accused was to be imprisoned or set at liberty was then before the Court for its consideration and decision. That would be contrary to first principles. No doubt, my brother Huddleston has correctly stated, in general terms,

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the practice—namely, that in many cases it is expedient, and indeed lawful, to determine a case of this kind, though not upon a motion for a *habeas corpus*, without waiting for the bringing up of the party charged upon *habeas corpus* into court; but those are cases in which something has previously taken place which puts the counsel for both parties upon equal terms, and in which it certainly does not appear, in any of those which were cited before us, that such a thing has ever happened, and I do not believe it has ever happened in any court of law in England, that counsel has been called upon to argue upon the validity or invalidity of a warrant or any other instrument upon which the liberty of the subject depended, without having had the opportunity of previously seeing and considering the instrument and preparing himself to argue upon it. In the present case I do not say that anyone is to blame, but no court in England would call upon counsel to argue a case under such circumstances. What would be done, and what would have been done in the present case had it become necessary, would be that the case would be allowed to stand over until a copy of the warrant had been delivered to the prisoner's counsel, and he had time to prepare himself to argue upon it. The question to which Mr. Bowen alluded, and on which he addressed us, might no doubt have arisen, whether that was to be at the instance of the prisoner. It is, however, of no consequence now, because I am quite certain that the Court would never have decided this case upon the validity of this second warrant, until the counsel who alleged that it was informal and insufficient to justify the imprisonment of the accused, had had an opportunity of considering his case fully. My opinion however, is, that the Court would have made no question as to who should make the application, whether it were the one side or the other, but would at once have granted the necessary time. Until a different practice was pointed out and required by the Judicature Act, the old practice that had prevailed from time immemorial in all courts of common law would have obviated any difficulty of this kind. Under that, as a general course, the party opposing the rule would obtain office copies of the affidavits on which it had been granted, so that the counsel who showed cause would know the case he had to meet, and, in order that his opponent might be in an equally advantageous position, he generally handed the affidavits which were to be used in showing cause to the counsel who supported the rule, and then, if the latter required time to meet them, the Court would on application extend the time for that purpose. Such, no doubt, would have been the case here if the Judicature Act had not introduced a different practice. Though that practice does not apply precisely to a case like the present, still it has led to a different mode of proceeding. The counsel who show cause against a rule do not now hand over their affidavits to the counsel who support it, because both sides come equally prepared with affi-



avits which have been filed before the motion comes on. But in the present case, unfortunately, the warrant, the validity of which might have been in question, and upon which the case might have depended, had not been previously shown to the counsel on the other side, and it is unquestionable that the Court never would have decided to imprison a person by virtue of a warrant, the validity of which his counsel had had no proper opportunity of impeaching before the Court. As there was considerable discussion during the argument upon points which seemed to involve a question as to whether we could properly look at and decide upon the validity of the second warrant, I think it right to say at once that I do not believe that a case involving the liberty of the subject would, or could ever be, determined in this or any other Court in England, unless both parties—the party claiming the discharge of the prisoner and the party opposing it—had both of them the same materials to argue upon, and were upon an equal footing in all that related to the argument and the ultimate decision of the case. Having made these observations, I will merely add that it is quite clear that this rule must be discharged, and the further proceedings before the magistrates will determine whether, when the evidence is completed before him, the extradition of the prisoner shall be ordered, or whether he shall be discharged and set at liberty.

HUDDESTON, B. — With regard to the first point I am entirely of the same opinion as my Lord. The question is whether the warrant discloses a good ground for detaining the prisoner. Now it is clear that it is a warrant for the safe custody of the party until the case can be properly inquired into. I make that observation because, throughout the current of authorities there is a distinction made between warrants for apprehension, warrants for safe custody pending the investigation before the proper tribunal, warrants for safe custody where the party is imprisoned for the purposes of state, or for the protection of individuals, and warrants in execution. Warrants in execution are in the nature of convictions, and it has always been held that warrants of that class require considerable strictness, for the reason that when the party is brought up on the *habeas corpus*, and is held under a warrant in execution, the Court can only judge by what appears in the warrant whether a crime has been committed, and whether the alleged criminal is properly held in custody. But warrants for apprehension are merely instruments not directed to the prisoner, but directed to the officer for his protection, and to enable him to take the person in custody either for the purpose of inquiry, or of holding him in custody while the inquiry is going on, or of keeping him in safe custody for some of the reasons I have mentioned. Now, doubtless the latter class of warrants, namely, where the party is to be held in safe custody during a particular time, would seem to require more particularity than a warrant for apprehension; but there

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are clear authorities to show that warrants for safe custody, even for public purposes, or for the protection of the public or individuals, may be in general terms. There is a case which illustrates this probably better than any other; I mean the case of *Rex v. Despard* (*ubi sup.*). A power was given by the 38 Geo. 3, c. 36, for suspending the Habeas Corpus Act, and it was by that statute enacted that where a person should be imprisoned for high treason, suspicion of treason or treasonable practices, or by warrant of any of Her Majesty's principal Secretaries of State, for such causes as aforesaid (that is, high treason, suspicion of treason, or treasonable practices), he might be detained in custody until the 12th day of February, 1799, that is to say, his right to be tried was to be suspended, and might be suspended, by a warrant where he was imprisoned for any of the aforesaid causes. In *Despard's* case the Secretary of State's warrant committed Colonel Despard to custody under that statute, alleging generally "treasonable practices," and he was brought up on a *habeas corpus*. Mr. Fergusson, who argued for the writ, pointed out that the court could not act upon such an indefinite warrant, from which it could not be said whether it was for high treason, or petty treason, or suspicion of either, or whether it was for being accessory after the fact, or it might be for publishing a seditious libel, or drinking to the health of a traitor, or asserting the Pope's supremacy, or a variety of other acts. The Attorney-General (Sir John Scott), in showing cause, did not rely upon the Act of Geo. 3, as legalising warrants in any other form than was warranted by the common law, but he relied upon the fact that the warrant was perfectly good at common law, and he cited and referred to upwards of fifty precedents for warrants of this kind, and pointed out those in particular that were under the reigns of William III., Queen Anne, George I., George II., and George III., and we shall see the importance of that presently when we come to the judgment of the Court, in which they admitted that those were authorities, and pointed out that, if any had been quoted under the reigns of Charles II. or James II., they would not have attached much importance to them; but, as these warrants were issued at the time when, as Lord Kenyon observed, "the liberties of the subject were well understood and nobly asserted," and many of them too, as he further said, "in the time of Lord Holt, a man above all praise, and who was assisted by other judges, one of whom was Mr. Justice Powell, who fell little short of Lord Holt himself," the Court held them to be authorities showing that at common law a commitment even for safe custody for political purposes, in contravention of the liberty of the subject, was perfectly good in describing the offence charged generally as "treasonable practices," which were the words used in the statute of Geo. 3. In the case of *Rex v. Gourlay* (*ubi sup.*), where a person was held under a commitment for safe custody under the Lunacy Act for the protection of the public, and which was

again a commitment very different from, and requiring greater strictness than a commitment for investigation merely, a general form was again admitted, and Lord Tenterden, in delivering judgment, said: "It is not a commitment for safe custody, in order that the party may afterwards be brought to trial, nor is it a commitment in execution; but it is a commitment for safe custody in order to secure the party and prevent mischief to His Majesty's subjects. That being the object, I think the warrant ought not to receive the same strict construction as a warrant in execution;" and he concludes his judgment by saying, "Upon the whole, I think that the warrant, not being a warrant of commitment in execution, is sufficiently certain, and that the prisoner must be remanded." Both these cases are authorities to show that, even in warrants for safe custody, a general assertion or a general charge is sufficient. Now the present is a warrant for the apprehension of the party, and issued under the provisions of the Extradition Act, 1870, which mentions "extradition crimes," a well-known term in the Act of Parliament. By the interpretation clause (sect. 26) an "extradition crime" is defined to mean "a crime which, if committed in England, or within English jurisdiction, would be one of the crimes described in the first schedule to this Act." Amongst those crimes is mentioned this, "crimes by bankrupts against bankruptcy law." I concede that, if the description in the first warrant had been "crimes against bankruptcy law," and the first warrant was framed under the Act of 1870, it would be insufficient, because that Act only applies to crimes committed by *bankrupts* against bankruptcy law; but the Extradition Act, 1873, enlarges that extradition crime to all crimes, *i.e.*, to "any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the Act of 1870." Therefore "crimes by bankrupts against bankruptcy law" must now be read as "crimes against bankruptcy law;" that is the general term. What then appears in the first warrant? That this man is charged with "crimes against bankruptcy law;" and therefore in following the exact words of what must now be considered the amended schedule of the Act of 1870, it is obvious that all that is necessary has been done; and it is convenient when we come to consider the reason why. The treaty itself between this country and Switzerland, in 1874, in the 10th article provides that the requisition for extradition may be made by means of the post or by telegraph. The magistrate receives information that something has been done which is an extradition crime, and he states that in his warrant in the very terms of the information which he has received, and when the matter is brought before him, and he proceeds to an investigation of the whole case, no doubt it must be shown that the magistrate has jurisdiction to deal with the accused because he has committed an extradition crime, but no *habeas corpus* would be granted to discharge the prisoner out of custody

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while that investigation is pending ; and the cases referred to by Mr. Greene, of *Rex v. Marks and others* and *Rex v. Krans and others*, are authorities confirming that view. Every protection is obviously given by the Extradition Act to persons taken up under its provisions. Everything in the nature of a political crime is expressly excluded, and no man can be apprehended for an extradition crime as a cloak under which he may be convicted of a political one (sect. 3, sub-sect. 1). The case of, I think his name was, Dr. Bernard, a few years ago, is a good illustration of this. The Act also provides (sect. 11) that, upon the magistrate's committing the allegation criminal to prison, he shall inform him that he has a right to a *habeas corpus*, and that the extradition warrant for sending him out of this country to the foreign state will be suspended for fifteen days in order to enable him, if he chooses to do so, to apply for a writ of *habeas* and have the question decided, when, if it turns out that the crime charged is not within the Treaty or the Act, he will be discharged. It is moreover provided by the 3rd section (sub-sect. 2), that a fugitive criminal shall not be detained or tried in the foreign state to which he may have been surrendered, for any offence committed prior to his surrender other than the extradition crime upon which the surrender is grounded until he has been restored or had an opportunity of returning to Her Majesty's dominions. Every possible protection, therefore, is given to a prisoner under this statute, and when I consider that, when I look to authority, and when I see what the nature of this warrant is, I feel perfectly satisfied that a warrant for apprehension in the general terms of the present one is a perfectly good and valid warrant, and that the prisoner under it cannot be discharged. But the matter has not rested there in argument, nor, indeed, has it in consequence of what has fallen from my Lord Chief Baron. I would, of course, speak with the very greatest respect of any opinion that may fall from my Lord, whose position in this court, whose great experience and great legal knowledge we all bear most willing testimony to ; but a judge sitting with other judges must have the courage to express his own opinions, and if he hears it said that a certain course is a direct violation of the law and constitution of the country, and he differs in opinion from that view, I think he is bound to express his own opinion upon the matter, and in so doing to give his reasons for expressing it. Now I say, and I say it with very great respect, that, as far as I know in practice and on authority, there can be no doubt whatever that a fresh warrant may be lodged, as has been done in the present case. A man is in custody, a writ of *habeas corpus* is obtained, not directed to the prisoner, though sued out very often by the prisoner or his friends, but to the gaoler, who has to show the causes under which he received and detains the prisoner in custody, and when he comes up before a judge on a *habeas corpus* he may show the warrant under which he received the man, and he may put

forward also the warrant under which he detains him. There may be one, two, three, or other warrants substituted for the original one; but if, when the matter is before the judge, there is a good warrant, that is sufficient to detain him. Now that raises the question, first, whether a second warrant can be lodged, upon which in principle I entertain no doubt, and in practice I may mention my own experience in a numerous class of cases which were considered in the Court of Queen's Bench in which that was invariably done. For authority there are numerous cases, beginning with that of *Reg. v. Richard and others* (*ubi sup.*) in the Queen's Bench, which was followed by many subsequent cases. In that case a *habeas corpus* had issued to bring up the bodies of certain pitmen who had been committed in execution by justices under the Master and Servant Act (4 Geo. 4, c. 34), sect. 3, and Mr. Whitehurst, then on the Midland Circuit, showed cause, with a warrant which was in all respects perfectly good, and which had been delivered to the gaoler a week after the commitment on the first warrant, which was bad on the face of it. I will not pledge my memory at this moment to say positively whether my learned leaders (Mr. Bodkin and Mr. Fry) and myself saw that second warrant before the case came on; but my strong impression is, that until it was produced in the Court of Queen's Bench we had never seen it. I am only now dealing with the question that a fresh warrant may be lodged, and I say that in principle and practice, and on authority, such a course has been adopted. Then can such second warrant be considered upon a rule like the present? That is the next question to be considered, and to answer it we must see how the practice has been arrived at in cases of this description. Formerly, on a motion for a *habeas corpus* the prisoner was brought up into the body of the court, or he was brought before a judge either on circuit or elsewhere; and it was held that he might be brought before every one of the judges in the land in favour of his liberty; but he was brought up under the *habeas corpus*, and he was bound to pay a sum not less than twelve pence per mile for travelling, and to enter into a certain bond for payment of money to take him back, and the expenses of the gaoler. This was an excessively expensive affair, and consequently it was thought desirable to provide some means by which that expense might be done away with and avoided. Accordingly, it was suggested and adopted, that a rule calling upon the gaoler to show cause why a *habeas corpus* should not be granted was substituted, upon which rule everything should be argued that could be argued upon the return of the prisoner, and judgment be taken upon it, just as occurs every day at chambers, when application is made to bail a prisoner in the country. The prisoner is not brought up, but an order is obtained in the nature of a *habeas corpus*, and a *certiorari* to bring up the depositions, and upon that order the counsel argue, and the judge directs that the

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prisoner shall be admitted to bail, or that the order shall be discharged. It is a very convenient practice. Now comes the question whether upon a rule such as this we may go into the question of the second warrant; and upon that I say again, in principle I do not see why it should not be so; in practice it certainly is done, and the authorities are conclusive on the point. There are the following cases: *Ex parte Cross* (*ubi sup*); *Ex parte Dauncey* (*ubi sup.*); *Ex parte William Bull* (*ubi sup.*); *Ex parte Phipps* (*ubi sup.*), and many other authorities down to the present time, in which it has been held, upon a rule of this nature, that the whole question may be gone into, and that, whether the second warrant was lodged before or after the rule was obtained, or even at the very moment only when the prisoner was brought up. I agree with Mr. Bowen that the real question for decision on a rule of this kind is, whether the prisoner at the moment it is being argued is entitled to be discharged. That has been the practice; but it has been suggested that it is an anomaly that the prisoner's counsel should not have had an opportunity of seeing the warrant. I do not know that he has any right to see the warrant. It may be that it is convenient that he should have an opportunity of seeing it, and it may be, in the present liberal mode in which justice is administered and every facility is given to the accused, that it would be well that he or his counsel should have the benefit of seeing it; but the warrant is for the protection of the officer who apprehends, and the gaoler who holds the prisoner. No doubt it may be that a prisoner might reasonably say, "If you are going to apprehend me on a warrant, let me see it;" and it would, I daresay, be a convenient practice that he should see it. So again, when a second warrant is returned, and when the practice is, as I have shown, to argue upon that return just as if a *habeas corpus* had been granted, it may be convenient for the counsel to say, "Do not put me in the invidious position of having to argue upon a document which I have never seen before." I agree that, if an application of that sort had been made, the proper course, and the course which any court would adopt, would be to give time to the counsel who asked for it under those circumstances; and that is what Mr. Bowen, on the part of the Attorney-General, offered to Mr. Atherley Jones, but Mr. Atherley Jones very properly said, "I do not want time to consider it." The fact is, he did not require any time to consider whether the specific charge in the second warrant was not most precise, as indeed it appears to be. In conclusion, then, I apprehend that the second warrant is clearly good, and indeed it seems to be admitted that it is so. The first warrant is good, a second warrant may be substituted, and the second warrant is good. Therefore, I am of opinion that the prisoner in this case is not entitled to be discharged. If he has any real ground for saying that he is not within the treaty, he may, when the case is completed, obtain, at any time within fifteen days thereafter, the



*habeas corpus* which will enable the question to be decided on its merits. This rule therefore must be discharged.

*Rule discharged.*

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Solicitor for the prisoner, *Merriman*.

Solicitor for the Crown, *Solicitor to the Treasury*.

Solicitors for the Swiss Government, *Freshfields and Williams*. *Extradition—  
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## QUEEN'S BENCH DIVISION.

*Wednesday, December 11, 1878.*

(Before MELLORE and MANISTY, JJ.)

BARTON REGIS UNION *v.* BERKSHIRE CLERK OF THE PEACE. (a)

*Pauper criminal lunatic—Order of maintenance—Settlement at  
time of making the order.*

*In 1862 a female criminal lunatic, after living with her husband, without pauper relief, for more than three years in the appellants' union, was acquitted on the ground of insanity on a charge of attempting to murder her child. Her husband's last legal settlement was then elsewhere, but he continued to live in the appellant's union; and in 1877 an order for her maintenance, under the authority of Reg. v. Stepney Union (L. Rep. 9 Q. B. 383), was made upon the appellants.*

*Held, upon a case stated, that the order was rightly made, not on the husband's last legal settlement at the time of her detention, but upon the appellants' union, in which was the husband's then settlement under 39 & 40 Vict. c. 61, s. 34.*

THIS was a special case, stated by consent of the parties, and by order under 12 & 13 Vict. c. 45, s. 11.

1. On the 9th day of July, 1867, Mary Coleman, being then charged with the offence of having attempted to murder her child, was removed from the parish of Westbury-upon-Trym in the appellants' union, where she was then residing, to the county gaol at Gloucester. On the 12th day of August following she was indicted for the said offence at the Gloucester assizes, and upon the trial being acquitted by the jury on the ground of her

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.



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insanity, she was ordered to be kept in prison in the county of Gloucester until Her Majesty's pleasure should be known.

2. By a warrant dated the 30th day of September, 1867, under the hand of one of Her Majesty's principal Secretaries of State, the said Mary Coleman was ordered to be removed to the Broadmoor Criminal Lunatic Asylum, and she was thereupon duly removed upon such warrant.

3. By an order dated the 21st day of September, 1867, two justices of the peace for the county of Gloucester ordered the guardians of the poor of the appellants' union to pay out of the common fund of their union weekly, from the time the said Mary Coleman should be received, and during such time as she should be detained in the Asylum for Criminal Lunatics at Broadmoor, the sum of 14s. to the superintendent of the said asylum, for the maintenance of the said Mary Colman. The above order of the 21st day of September recited, as the ground upon which it was made, the fact that Samuel Coleman, the husband of the said Mary Coleman, was at the date of her imprisonment as aforesaid residing, and had resided for one year and upwards thence immediately preceding, within the appellants' union, and had continually resided therein from the date of such imprisonment down to the date of the said order, and was irremovable therefrom, and that upon due inquiry he was found to be unable to pay the expense of the maintenance of his said wife in a lunatic asylum. The above order did not recite or in any wise purport to be made on the ground that the said Samuel Coleman was at the date of such order legally settled in the appellants' union.

4. Against this order there was no appeal, and the appellants regularly paid the sum of 14s. per week to the superintendent of the Broadmoor Asylum as ordered down to the month of May, 1874, when they discovered that the order was void, there being no provisions in the Acts of Parliament relating to criminal lunatics, empowering justices of the peace to charge the maintenance of a criminal lunatic upon the guardians of the union wherein such lunatic shall have acquired an exemption from removal, but only the guardians of the union wherein such lunatic shall be adjudged to be legally settled. From the date of such discovery the appellants have refused to make any further payments for the maintenance of the said Mary Coleman at the Broadmoor Asylum. The superintendent of the said asylum, however, acting on behalf of Her Majesty's Government, has continued to maintain her in the asylum, and has sent to the appellants quarterly, up to the 29th day of September, 1877, an account, debiting them with the expense of such maintenance.

5. By an order dated the 4th day of December, 1877, two justices of the peace for the county of Berks adjudged the said Mary Coleman to be legally settled in the said parish of Westbury-upon-Trym, in the appellants' union, and directed the appellants' to pay thenceforth, from the date thereof, to the

superintendent for the time being of the criminal lunatic asylum at Broadmoor, weekly the sum of 14s., for the maintenance of the said Mary Coleman during her confinement therein. This order was obtained by the superintendent when he found that the order of the 21st day of September, 1867, was null and void.

Against this order of the 4th day of December, 1877, notice of appeal was duly given to the respondent, and it is upon the validity of such order that the opinion of this honourable Court is now sought.

6. The said Samuel Coleman has continuously resided within the said parish of Westbury-upon-Trym without any break of residence from the year 1862 up to the present time, and during such residence had always supported himself by his labour, and had never received any parochial relief, unless the maintenance of his wife in the Broadmoor Lunatic Asylum as aforesaid can be considered in law as parochial relief received by him. From the year 1862 until her arrest on the 9th day of July, 1867, the said Mary Coleman resided with her husband, who maintained her in such parish as part of his family, and, although he was unable to pay 14s. a week for her maintenance in a lunatic asylum, he could have maintained her in his own house as a sane person.

7. It was contended on behalf of the respondent that the said Mary Coleman was at the date of the order now appealed against legally settled in right of her husband in the said parish of Westbury-upon-Trym, by reason of her husband, the said Samuel Coleman (to whom she was married in 1860), having resided in the said parish for the term of three years and upwards next before the application for the said order, in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable within the enactment of 39 & 40 Vict. c. 61, s. 34; that her maintenance in the said asylum was not relief to him within the meaning of sect. 1 of 9 & 10 Vict. c. 66; and that, even if it was, he had resided more than three years after deducting the period during which she was so maintained, so as to gain a settlement in the said parish.

8. It is contended on behalf of the appellants that by reason of the said Mary Coleman having been maintained in the Broadmoor Lunatic Asylum during the period and under the circumstances hereinbefore set out, her husband, the said Samuel Coleman, was during the whole period of such maintenance, and still is, a person receiving relief within the meaning of 9 & 10 Vict. c. 66, s. 1.

9. It is further contended by the appellants that the 34th section of 39 & 40 Vict. c. 61, is wholly prospective in its operation, and that the three years' residence specified therein is a three years' residence commencing at a period subsequent to the 15th day of August, 1876, the date of the passing and coming into force of the said Act; and that consequently the said Mary Coleman and her husband had not, at the date of the

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application for the said order of the 4th day of December, 1877, acquired a settlement in the said parish of Westbury-upon-Trym under or by reason of the provisions of the said section.

10. If the said Mary Coleman had not, by reason of the circumstances hereinbefore set out, acquired at the date of such application as aforesaid a settlement in the said parish of Westbury-upon-Trym, under 39 & 40 Vict. c. 61, s. 34, it is admitted that she was at the date of such application, and still is, legally settled in the parish of Almondsbury, in the Thornbury Union. It is also admitted that she was settled there in September, 1867, when the Secretary of State's order was made for her removal to the asylum.

11. The appellants further contend that the settlement of the insane person into which the justices of the peace are directed to inquire under 3 & 4 Vict. c. 54, s. 7, is the settlement of such insane person at the date of the order for his or her removal to the lunatic asylum, and not the settlement which he or she may have at the date of the application for the order of maintenance.

The question for the opinion of this honourable court is whether the order of the 4th day of December, 1877, adjudging the settlement of the said Mary Coleman to be in the said parish of Westbury-upon-Trym, is, upon the facts stated, properly made.

And it is agreed that a judgment in conformity with the decision of this honourable court, and for such costs as this court shall adjudge, shall be entered on motion by either party at the general quarter sessions of the peace to be holden in and for the county of Berks next, or next but one, after such decision shall be given.

*Charles*, Q.C. (with him *Clerk*) argued for the appellants.—This order was made upon the authority of *Reg. v. Stepney Union* (L. Rep. 9 Q. B. 383), by which it was held that, notwithstanding the total repeal of 9 Geo. 4, c. 40, by 8 & 9 Vict. c. 126, s. 1, the effect of 3 & 4 Vict. c. 54, s. 7, was so far to incorporate the 54th section of the first-named Act as to continue the power of two justices to inquire into and adjudge the settlement of a pauper detained in custody during pleasure, who has been acquitted of felony on the ground of insanity. and to order the overseers or guardians of the parish of settlement to pay such weekly sum for his maintenance as the justices shall from time to time direct. It must be admitted that there is authority for making this inquiry and order of maintenance at any time during the detention in custody; but in all the cases the settlement determined by the justices has been that which existed at the time of the removal under the order of the Secretary of State. Here the settlement at that time was not in the appellants' union, and if the order ought to have been made on the parish or union of that settlement, this appeal must be allowed. In consequence of the decision of this court in *Brampton Union v. Carlisle Union* (38 L. T. Rep. N. S. 714; L. Rep. 3 Q. B. Div. 479), it cannot now

be contended that the husband's settlement at the time this order of maintenance was made, was anywhere but in the appellants' union. The only question, therefore, for consideration now is whether the settlement at the time of the first detention in custody, or that at the time of the inquiry and order of maintenance is to be determined by the justices. One inquiry only is provided for, and the determination must apply to the whole term of the detention. If a female criminal lunatic can derive a settlement from her husband during the time of her detention, that settlement might vary during her detention; but there is no provision for rescinding an order of maintenance, at the instance of the parish or union upon which the order has been made, when the husband's settlement has become changed.

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*McKellar* (with him *Bowen*) for the respondent.—It is admitted that upon the authorities there is no limitation as to the time of this inquiry and order of maintenance; and the provision simply requires the justices to ascertain the place of the last legal settlement. There can be only one such place, namely, that of the last legal settlement at the time of the inquiry. There is nothing in any Act of Parliament which can suggest to the justices that under such circumstances as these it is their duty to ascertain some other settlement than the last, and it might be a very difficult thing to do. The consequences of this clear and definite construction of the Act ought to have no weight in the matter; but if they be considered, in this particular case there can be no hardship upon the appellants. Should the detention of the insane woman cease, as it may do at Her Majesty's pleasure, the same parish would be responsible for maintenance when she is at large as is now liable for her maintenance in Broadmoor. If during her detention her settlement should change in consequence of her husband's removal, there is nothing to prevent the superintendent of the asylum from applying again to two justices, at the appellants' instance, for another order of maintenance upon the husband's new place of settlement.

*Charles*, Q.C. in reply.

*MELLOR*, J.—I confess myself to have had very considerable doubt upon this point during the argument. It seems, however, to me a greater hardship and a very strange conclusion, if a woman detained during Her Majesty's pleasure should be maintained by a different parish from that which would have to maintain her when she comes out. It is said that the inquiry was intended to be made once for all at the time when the lunatic is first detained, and that if made afterwards it cannot concern a settlement which she could not acquire during detention. There may be hardships upon parishes or unions thus rendered liable, and difficulties in ascertaining the proper liabilities; but the governing principle of a decision upon such a question as this should be the comparative hardship, and I think the respondent's is the more reasonable construction. I answer the question in the respondent's favour and affirm the order of maintenance.

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MANISTY, J.—I also am of opinion that our judgment must be for the respondent. To say that the case is free from doubt would be to go beyond any conclusion possible concerning this confused legislation. I agree, however, that if we can construe the Act in accordance with general principles as to the parish which would have to maintain this woman if she were free, we ought to do so; and it seems to me that the respondent's construction is the better one of the two. Looking at the case of *Reg. v. Stepney Union*, what is meant is clearly that, although the first statute is repealed by the third, you must give effect to the enactment incorporated by the 7th section of the intermediate Act, by excluding from the repeal as much of the first Act as is necessary for that purpose. At p. 392, Cockburn, C.J., puts it: "There is no doubt that sect. 7 of 3 & 4 Vict. c. 54, was introduced, not so much for the purpose of creating a substantive enactment as for the purpose of modifying the previous enactment of sect. 54 of 9 Geo. 4, c. 49." But the conclusion is that we must interpret sect. 7 by reading into it so much of the previous Act as to make it a substantive enactment. Sect. 7 does not say the time at which the settlement is to exist of which the inquiry must be made, nor indeed does the 54th section of 9 Geo. 4, c. 40. But the inquiry must be as to the place of the last legal settlement; the justices are not to ascertain in what place the lunatic seems to have been legally settled at the time of the Secretary of State's order. There is nothing to militate against the ordinary construction of the words, and that construction is reasonable and in accordance with general principles.

Leave to appeal was granted to the appellants.

*Judgment for respondent.*

Solicitors for appellants, *Gregory, Rowcliffe, and Co.*

Solicitors for respondent, *Hare and Fell*, for the Solicitor to the Treasury.

## WESTERN CIRCUIT.

WINTER ASSIZES, 1879.

DEVIZES.

*Monday, January 13.*

(Before Mr. Justice MELLOR.)

REG. v. WOODMAN. (a)

*False pretences—Promissory false pretence—Insufficient to sustain indictment—Remote false pretence.*

*An indictment charged one Gregory with having obtained 30l. from prosecutor, Woodman, on the false pretence that he, the said Gregory, then wanted the loan of 30l. to enable him to take a public-house at Melksham; by means of which said false pretence the said Gregory did then unlawfully and fraudulently obtain the said sum from the said Samuel Woodman with intent to defraud. Whereas the said Gregory was not then going to take a public-house at Melksham . . . as he the said Gregory well knew. And whereas the said Gregory did not then want a loan of 30l. or any money to enable him to take the said house.*

**A**T the close of the prosecutor's evidence,  
**MELLOR, J.**—It seems to me that the real motive and inducement was this: the prisoner says, "I am going to take a public-house; if you will let me have 30l. I will do so." The inducement for all was, "I shall be able to return you the 30l. while I carry on business at Melksham." It was, therefore, the expectation of being paid out of the profits of the business at Melksham. The old rule is, there must be a false representation of that being alleged to be a fact which is not a fact.

*Ravenhill* for prosecution, suggested that here the existing fact was the intention of prisoner.

**MELLOR, J.**—How can you define a man's mind? It is a mere promissory false pretence.

*Ravenhill* proposed to show that prisoner was not able, at the time of making the pretence, to take a public-house.

**MELLOR, J.**—That is too far afield. In criminal matters we must take the immediate result. This is one of those cases in

(a) Reported by H. T. TAMPLIN, Esq., Barrister-at-Law.



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which the prosecutor was too credulous. [After having conferred with Denman, J., the learned judge continued:] My brother Denman is clear that there is not enough evidence to leave to the jury of any existing false pretence. We both think that, had the whole circumstances been known earlier, something might have been made of a statement by the prisoner that he had 30*l.* at home and that he could then take the house.

## WESTERN CIRCUIT.

WINTER ASSIZE, 1879.

DEVIZES.

*Monday, January 13.*

(Before Mr. Justice DENMAN.)

REG. v. SAUNDERS. (a)

*Offences against the Person Act—Dangerous thing—Intent—Questions for jury.*

**P**RISONER was indicted under 24 & 25 Vict. c. 100, ss. 28 and 29. The former section renders any person guilty of a misdemeanour who “shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm.” The latter section making it a felony to “unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to, or cause to be taken or received by, any person any explosive substance or any other dangerous or noxious thing, or put or lay in any place, or cast or throw at, or upon, or otherwise apply to any person, any corrosive fluid, or any destructive or explosive substance with intent . . . . to maim,” &c.

It was proved in evidence that on the 7th of September, 1878, prisoner Saunders, a sailor, travelled in company with thirty others, all in uniform, by a train on the South-Western Railway. The prosecutor Hunt, swore that while at work near Tisbury

(a) Reported by H. T. TAMPLIN, Esq., Barrister-at-Law

Mill he saw the prisoner, who was leaning out of a compartment, throw something from the train. This afterwards turned out to be an "electric fuse detonator," i.e., the cap of a torpedo, and contains fulminate mercury, gun cotton, and meal powder. The prosecutor, not knowing the nature of the article thrown, went to it and either kicked it or pulled a wire, with the result that it exploded, inflicting thirty-five wounds on his arm, neck, and face. One of the witnesses stated that probably the detonator had already been partially exploded, or otherwise more severe injuries must have been inflicted on the prosecutor.

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At the close of the case for the prosecution,

*Murch* asked his Lordship's opinion whether this was a dangerous thing within the meaning of the statute.

DENMAN, J.—Whether this is a dangerous thing or not does not alter the case.

*Murch*.—Is there here any evidence of any wounding?

DENMAN, J.—If the jury think there is evidence that he threw it at this man they would convict.

*Murch*.—The question is, is it not too remote? The evidence is that this thing was thrown down, and then the man picked it up and was injured.

DENMAN, J.—The evidence is that probably these things would not go off of themselves. I doubt whether there is any evidence of a wounding. I think a wounding should be a direct, not an indirect, wounding. If one laid a torpedo in a road and a cart wheel exploded it, there would be a question for the jury.

*Murch*.—Is there any evidence of intent?

DENMAN, J.—That is for the jury. There is evidence that the man really intended that the prosecutor should take it up and explode it so as to bring it about his person, which is for the jury.

*Murch*.—What evidence is there that this man could possibly know what the prosecutor would do with it?

DENMAN, J.—That also is a question for the jury.

*Kinglake* for the prosecution.

*Murch* for the defence.

## HIGH COURT OF JUSTICE.

## QUEEN'S BENCH DIVISION.

Nov. 7, 8, and Dec. 20, 1878.

(Before COCKBURN, C.J., MELLOR and FIELD, JJ.)

MOYCE *v.* NEWINGTON. (a)

*Sale—Fraud—False pretences—Innocent purchaser—Passing of property—24 & 25 Vict. c. 96, s. 100.*

*The plaintiff purchased some sheep in an open market, recently established under a local Act, paid a fair price for them, and removed them to his farm. The person from whom he purchased them had obtained them just before from the defendant for a cheque upon a bank which had no account in his name; but the plaintiff knew nothing of this. When the cheque was dishonoured, the defendant took criminal proceedings against the drawer, and afterwards got him convicted for obtaining the sheep under false pretences. On the day before this conviction, the defendant with a policeman removed the sheep from the plaintiff's to his own farm, and the plaintiff now brought this action to recover them.*

*Held, that, the property in the sheep having passed to the plaintiff before the defendant had avoided the contract, which he had been induced to enter into by fraud, the provision for restitution upon conviction in 24 & 25 Vict. c. 96, s. 100, had no application, and that the plaintiff was entitled to recover.*

**T**HE following considered and written judgment of the Court fully describes the facts and arguments as they were adduced at the hearing.

November 7 and 8.—Willoughby, for the plaintiff, moved for judgment.

Grantham, Q.C. and Arbuthnot showed cause for the defendant. Willoughby in reply.

*Cur. adv. vult.*

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

December 20.—COCKBURN, C.J. (the Court consisted of Cockburn, C.J., Mellor and Field, JJ.)—This was a case tried before me at the last assizes for the county of Kent, in which the action had been brought by the plaintiff to recover a lot of forty-nine sheep under the following circumstances: On the 30th day of October, 1877, the plaintiff, who is a butcher, and who is in the habit of attending cattle and sheep markets, being at Maidstone market, bought of a man named Wale, through a salesman of the market, this flock of forty-nine sheep. The purchase was made in the open market; the price was a fair one, and was paid. The transaction was a regular one, and no blame attached to the plaintiff in respect of it. It turned out, however, that the sheep had been obtained from the defendant, who is a farmer, by Wale, under colour of a purchase, but in reality by false pretences. Proposing to buy the sheep at the price of 48s. a head, Wale gave in payment a cheque on a bank at which he had no funds, and kept no account. The cheque was of course dishonoured. A warrant was taken out against Wale by the defendant on the 25th day of October, and he was afterwards convicted of having obtained the sheep by false pretences, and it must be taken for the present purpose that they were so obtained. It is to be observed that, though the sale from Wale to the plaintiff took place in open market, it was admitted before us that the market, having been recently established by the corporation of Maidstone under a local Act, was not one in respect of which the protection arising from a sale in market overt would attach. The sheep were taken to the plaintiff's premises at Seale, which is some distance from Maidstone, and arrived there on the 31st, the ensuing day. On the 6th day of November the defendant, having in the meantime set the police to work, and having learned what had become of the sheep, went with a police officer to the plaintiff's premises, and there took possession of the sheep, which were afterwards removed to his own farm. On the 7th day of November, Wale was convicted of obtaining the sheep by false pretences. The sheep being already in the plaintiff's possession, no order of restitution was asked for. The question under the circumstances is which of the two, the plaintiff or defendant, is entitled to the sheep. Although, if the matter rested on abstract principle, it might be open to be contended that, inasmuch as to make a valid contract both parties must intend to be bound by it, consequently, where in an apparent contract of sale the buyer intends to get the goods but not to pay for them, but to defraud the seller, the contract fails to take effect, and though the seller intended the property to pass, yet that the contract failing to take effect the property still remains unaltered, yet the question is now so concluded by authority as to be no longer open to discussion. We must now take it to be settled—it is unnecessary to go through the cases which are set out in Mr. Benjamin's work—that, though a seller is induced to sell by the fraud and false pretences of the buyer, and though it

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is competent to the seller by reason of such fraud to avoid the contract, yet till he does some act so to avoid it, the property remains in the buyer; and that if he in the meantime has parted with the thing sold to an innocent purchaser, the title of the latter cannot be defeated by the original seller. The reasoning on which this conclusion is based may not appear altogether consistent with principle, and agreeing in the result we should prefer to accept the view of the American Courts as stated in the case *Root v. French* (11 Wendell, 570), a case decided in the Supreme Court of Judicature of the State of New York, according to which the preference thus given to the right of the innocent purchaser is treated as an exception to the general law, and is rested on the principle of equity that, where one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third party to commit the fraud. But on whatever ground it may be said to rest, the law must be taken to be now definitely settled. The question, which in some cases might be a very material one, as well as one of some nicety, namely, what on the part of the defrauded seller, short of retaking possession of the thing sold, will amount to an avoidance of the contract, does not arise in the present instance. The defendant, not knowing what had become of his sheep, or where to find Wale, his buyer, had done and could do nothing beyond giving notice to the police up to the time when the sheep were bought by the plaintiff. We must take it, therefore, as incontestable that, but for the subsequent conviction of Wale for having obtained these sheep by false pretences, no question could be raised as to the title of the plaintiff. But it is contended that by reason of such conviction the defendant is entitled to the benefit of the provision of the 24 & 25 Vict. c. 96, s. 100, which enacts that where property has been obtained (*inter alia*) by false pretences, on conviction of the party so obtaining them, restitution shall be made to the party by whom they have been so obtained. But we are clearly of opinion that this enactment, which is in these terms, "If any person guilty of any felony or misdemeanor in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner," has no application to such a case as the present. The language applies, and is obviously intended to apply, to cases, and to those only, in which possession has been obtained without the property passing. This was the construction put on the statute by the court in *Lindsay v. Oundy* (L. Rep. 1 Q. B. Div. 348), and, though the view there taken by the Court on the primary question as to whether a contract had been made by the seller with the person obtaining the goods was reversed on appeal, the second ground of the judgment, which is the one immediately applicable to the

present case, remains unshaken, and we have no hesitation in adhering to it. And it is strongly confirmed by the case of *Horwood v. Smith* (2 T. R. 750), which was a case of sheep stolen, and sold by the thief in market overt, and in which subsequently to the sale, the thief was convicted of the larceny; yet it was held that, as the conviction did not take place till after the sale, the owner was not entitled to restitution under the 21 Hen. 8, c. 11. In the present case, as in the foregoing, there was no property in the prosecutor at the time of the conviction. It had been parted with by a contract, which, though under the circumstances voidable, ceased on the sale before it had been avoided to be any longer voidable, and as to which therefore the right of the plaintiff had become indefeasible. It cannot have been the intention of the statute to defeat it nevertheless, and by the mere conviction of the fraudulent purchaser to deprive the innocent buyer of the right which, according to the decisions in the series of cases already referred to, had become absolute in him. Our judgment must therefore be for the plaintiff.

*Judgment for the plaintiff.*

Solicitors for plaintiff, *Palmer, Bull, and Fry.*

Solicitors for defendant, *S. F. Langham and Son.*

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## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*June 20 and Dec. 20, 1878.*

(Before COCKBURN, C.J., MELLOR and LUSH, JJ.)

REG. v. HOLBROOK. (a)

*Libel—Newspaper—Authority to editor—Protection of proprietor  
—6 & 7 Vict. c. 96, s. 7.*

*Upon a criminal information for libel it was proved that the three defendants, the proprietors of the newspaper in which the libel appeared, took an active part in the management of the paper, but had given a general authority to a competent editor to publish whatever he thought proper in the literary part of it, which*

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.



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*contained the libel. It was also proved that at the time of the publication of the libel, one of the defendants was absent from home on account of ill health, and that neither of them had given any authority for, or consent to, or had any knowledge of the publication of the libel. The jury found that the defendants had not brought themselves within the protection provided by 6 & 7 Vict. c. 96, s. 7, and convicted them all.*

*Held, by Cockburn, C.J. and Lush, J. (dissentiente Mellor, J.), that the direction at the trial was defective, in not explaining that a general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law; and that the verdict—at least as to the absent defendant—being inconsistent with that principle, there must be a new trial.*

**T**HIS was a rule *nisi* for a third new trial on the ground of misdirection in a criminal information for libel, which had been twice tried at the Winchester Assizes. Upon both occasions the jury had convicted the defendants.

A similar rule was argued on the 30th day of November, 1877, after the first trial, and is reported at length L. Rep. 3 Q. B. Div. 60; 37 L. T. Rep. N. S. 530. The rule was then made absolute by Cockburn, C.J. and Lush, J. (Mellor, J. dissenting.) In consequence, the second trial took place at the spring assizes 1878, before Grove, J.

*June 20.—Charles, Q.C. and A. L. Smith, showed cause on behalf of the prosecution.*

*Cole, Q.C. and Folkard supported the rule.*

The facts, the direction of the learned judge, and the arguments are fully described in the several judgments of the Court.

*Our. adv. vult.*

*December 20.—LUSH, J.—*The question presented for our decision on this rule is substantially that which arose upon the former motion for a new trial, and which was argued in November of the last year. Upon the first trial it was proved that the literary department of the newspaper in question had been intrusted to an editor, who inserted in it what he thought fit in the way of articles, correspondence, &c.; that of the three defendants who were proprietors of the paper each took the management of a particular department of the business other than the literary department; that at the time of publication of the libel, one of them was absent from home on account of ill health, and that neither of them had given any authority for or consent to the publication complained of, or had any knowledge of the libellous article until his attention was called to it, after the paper was in circulation. My brother Lindley on that occasion ruled, as a matter of law, that as an authority had been given to the editor to edit the paper, and to insert what he thought fit without

supervision or control, the libel could not be said to, have been published without the authority of the defendants within the meaning of the Act 6 & 7 Vict. c. 96, s. 7. The Lord Chief Justice and myself took a different view of the meaning of that section, and for reasons we then gave, we held that the "authority" mentioned in the 7th section was an authority to publish the libel, and that the general authority given to the editor to use his discretion in admitting or rejecting articles or correspondence, was not of itself sufficient under the circumstances to make the proprietor criminally responsible. Upon the second trial, the ruling in which is now in question, the evidence of authority was carried no further than on the former occasion ; but instead of holding as a matter of law that the 7th section of the Act did not protect the defendant, the learned judge left the question of authority to the jury, but without such an explanation of the meaning of the section as appeared to the majority of the court on the previous occasion to be required in order to enable the jury properly to apply it to the facts. Other grounds, such as want of due care and caution, the omission to stop the sale of papers outstanding in the hands of retail sellers when the attention of the two defendants who were in Portsmouth was called to the objectionable article, and the inadvertent sale in the shop afterwards of another copy of the paper were also put forward ; but the jury must have found their verdict on the question of authority, inasmuch as they implicated the absent defendant, against whom these which I may call minor matters of complaint were not and could not have been made. As my brother Mellor, after a second argument, retains the opinion which he expressed before, and as my brother Grove, as I infer from his summing-up, rather inclines to the same opinion, I have carefully reviewed the authorities and the argument ; and after the best consideration which I can give to the case, I am constrained to hold that the construction of the Act which the Lord Chief Justice and myself adopted on the former occasion, is the true construction. It must be admitted that the 7th section upon which the question turns is not so precise and clear as it might have been. In order to ascertain the intentions of the Legislature, we must have recourse to the well-known rule of construction laid down by Coke, C.J., in *Heydon's case* (3 Rep. 7a) : "For the sure and true construction of all statutes in general," he says, "(be they penal, or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered : First. What was the common law before the making of the Act ? Secondly. What was the mischief and defect for which the common law did not provide ? Thirdly. What remedy the Parliament hath resolved and appointed. Fourthly. The true reason of the remedy ; and then the office of the judges is always to make such construction as shall suppress the mischief, and advance the remedy. "Pursuing this line of reasoning, the first question is : What was the law as regards the

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criminal liability of the proprietor of a newspaper for libel? Libel on an individual is, and has always been regarded as both a civil injury and a criminal offence. The person libelled may pursue his remedy for damages, or prefer an indictment, or, by leave of the court, a criminal information, or he may both sue for damages, and indict. It is ranked amongst criminal offences because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace; but the libeller is not the less bound to make compensation for the pecuniary or other loss or injury which the libel might have occasioned to the person libelled. In this respect libel stands on the same footing as an assault, or any other injury to the person. But the publication of a libel, when prosecuted as a criminal offence, was treated upon an exceptional principle, and with exceptional severity. The maxim *Respondeat superior*, which (with rare exceptions founded on reasons not applicable to libel, which I will presently notice) pertains to civil liability only, was applied to an indictment for libel; and the proprietor of a newspaper in which a libellous article had been inserted, was held to be criminally, as well as civilly responsible for it, though he had never authorised it, or had anything to do with its insertion, and whether the editor had inserted it by negligence or wilfully. It was not so in other cases of personal injury. If a coachman, accustomed to drive, were, while engaged on his master's business, by carelessness or furious driving, to cause the death of another, the master would be liable to an action for damages, but not to a criminal prosecution. The offending servant alone could be charged with the manslaughter; and if the coachman were to be guilty of such an offence while using his master's carriage without his permission and upon his own business, or if while doing his master's work he were wantonly to assault another, the master would not be liable even to an action for damages. Subject to the exceptions already referred to, the criminal law makes no one punishable for an offence but the person who either committed it or incited and procured the other to commit it or who aided in its commission. I need only select two cases from the books to show what the criminal law of libel was. The one is *Rex v. Walter* (3 Esp. 21). "A criminal information had been filed against the proprietor of the *Times* for a libel on a lady. The defendant pleaded not guilty, and proved at the trial that although he was the proprietor of the paper, he had nothing to do with the conducting of it; that he resided entirely in the country, and that his son was concerned in the conducting of the paper, without any interference on his part. Mr. Erskine, his counsel, contended upon this evidence that, though his client might be liable in a civil suit for all acts of his agent, it was otherwise when he had to answer criminally; that though the proving him to be the proprietor of the paper might *primâ facie* subject him criminally, it was otherwise when it was clearly shown that the fact of the publication was not his, nor done with his privity; that *actus non*

*facit reum nisi sit mens, rea*, so that if the act of publication which constituted the crime was proved to be that of another, the jury would be bound to acquit the defendant. Lord Kenyon said he was clearly of opinion that the proprietor of a newspaper was answerable criminally for the acts of his servants or agents for misconduct in the conducting of the paper; that this was not his opinion only, but that of Lord Hale, Justice Powell, and Justice Foster, all high law authorities, to which he subscribed. This was the old and received law for above a century, and was not to be broken in upon by any new doctrine upon libel." This occurred in 1808. I have cited the case in full from the report, because of its exact analogy in all material circumstances to the present case. The other case is that of *Colburn v. Patmore*, tried in 1834, and reported in 1 C. M. & R. 73. A criminal information had been filed against Mr. Colburn, as the proprietor of the *Court Journal*, for a libel on a lady. He pleaded guilty, and was sentenced to pay a fine of 100*l.* and to be imprisoned till the fine was paid. He paid the 100*l.*, and then brought an action against his editor for breach of duty in inserting the libellous paragraph, alleging that it was done without his authority or knowledge, and in violation of the contract between them. This allegation was fully proved, and a verdict was given for the plaintiff for a sum by way of damages, which included the 100*l.* penalty. A motion was then made to arrest the judgment on the ground that the plaintiff was in contemplation of law a party to the offence, and one wrongdoer cannot have in a Court of law contribution or redress against another who was his accomplice. The judgment was ultimately arrested because of a defect in the pleadings, it not being alleged that the plaintiff did not sanction the circulation of the journal after he knew of the libel, and so became actual "publisher" of the libel. But the case is important for the uncertainty which evidently prevailed, both on the bench and between the counsel on both sides as to the state of the law. The late Mr. Justice Maule was counsel for the defendant, the editor, and it never occurred to his acute and well-informed mind to suggest that Mr. Colburn brought the mischief upon himself by pleading guilty, and that he might have defended himself by proving the real facts. This would have been an obvious ground of defence for his client. On the contrary, he admits in his argument "the law has made the proprietor of a newspaper criminally answerable for the publication of a libel in its columns, whether the libel was inserted with or without his knowledge," and his only argument was that though the plaintiff was actually innocent, the two parties were in the eye of the law equally guilty. Sir Wm. Follett, on the part of Mr. Colburn, contended that as his client was, in fact, innocent, the rule of law which prohibited a claim for redress by one wrongdoer against another ought not to be held applicable. Baron Alderson remarked, in the course of the argument "Is it not more correct to say that the plaintiff was actually

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ignorant, but legally ignorant ? ” He afterwards remarks : “ A master is presumed to authorise the insertion of a libel ; in other cases he is not presumed to authorise the wilful act of his servant either in civil or criminal proceedings. Does the proprietor of a newspaper give authority to the editor to publish everything libellous or not ? ” This then was the state of the law before the Act was passed. The proprietor of a newspaper which contained a personal libel was treated as a criminal, though he had not himself committed the criminal act, or procured or incited another to commit it, nor aided in its commission, nor knew that it was about to be committed. I think it cannot be doubted from the tenor of the Act itself, apart from its historical origin, that the intention of the Legislature was, amongst other things, to mitigate the rigour of the common law in this particular, and to place the proprietor of a newspaper in the same position as any other employer, whose servant had in the course of his employment committed an offence against, and to the injury of a third person. The Act is entitled “ An Act to amend the law of libel,” and its declared objects are—first, the better protection of private character ; secondly, the more effectually securing the liberty of the press ; and, thirdly, the better preventing abuses in exercising the said liberty.” The second object forms the subject of several sections, and by them the defendant in an action for libel is allowed to give in evidence in mitigation of damages (under certain conditions) an apology ; and to pay money into court ; and the defendant in an indictment or information is permitted to plead the truth as a justification provided he shows that the publication was for the public benefit ; and to be entitled to costs upon a verdict of not guilty. Between these latter provisions comes the 7th section, the true meaning of which is the question now before us. The words are : “ Whensoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care and caution on his part.” Although the section is wanting in precision, it seems clear that the word “ publication,” wherever it occurs in the section, points to the libel and not to the newspaper. The section says nothing about newspapers. It applies to any printed or written slander whether contained in a newspaper, book, pamphlet, handbill, or letter. What it deals with is the libel, and nothing more. Again, the clause does not say what is to be the effect of proving the negative ; but there can be as little doubt that it means it to be an entire defence entitling the defendant to a verdict and not merely to a mitigation of punishment. The effect of it, read by the light of previous decisions, and read so as to make it remedial, must be, that an



authority from the proprietor of a newspaper to the editor to publish what is libellous is no longer to be, as it formerly was, a presumption of law, but a question of fact. Before the Act the only question of fact was whether the defendant authorised the publication of the paper; now it is whether he authorised the publication of the libel. It is true that the production of the paper which contained the libel, coupled with proof that the defendant is the proprietor, is *prima facie* evidence that he caused the publication of the libel, and the onus is on him to prove the negative. But when he has proved that the literary department was entrusted entirely to an editor, the question what was the extent of the authority which that employment involved, is to be tried upon the principle which is applicable to all other questions of authority; and I think the jury ought to be told, in this as in every other case, that criminal intention is not to be presumed, but is to be proved; and that, in the absence of any evidence to the contrary, a person who employs another to do a lawful act, is to be taken to authorise him to do it in a lawful and not in an unlawful manner. This is the doctrine which is applied to other cases of wrong done by servants when it is sought to fix with criminal liability the employer; and the statute intended to place libel upon the same footing in this respect as other torts. Although the employer is liable civilly for such a wrong, this is not upon the presumption of authority, but by virtue of the maxim *Respondeat superior*, which, on grounds of policy and general convenience, puts the master in the same position as if he had done the wrong himself—a maxim which, as I before observed, pertains to civil, and not, except in rare instances, to criminal liability. I am far from saying that the mere appointment of an editor without supervision or control, may not, in some cases, involve an authority to publish libels. If the paper was a calumnious paper, its general character would negative the ordinary presumption of innocent intention, and fairly lead to the inference that the proprietor authorised the insertion of slanderous articles. But that cannot be said of a respectable paper, as the one in question is admitted to be. The exceptionable class of cases to which I have referred are public nuisances. In these cases the wrong is done to the public, and not to any particular individual; and in that case no one can sue for damages unless he happens to have sustained some exceptional injury. Of such a class the case of *Reg v. Stephens* (L. Rep. 1 Q. B. 702) is an illustration. The workmen of the owner of a colliery quarry had stacked the refuse of the quarry by the side of a navigable river in such a manner that it fell into the stream and obstructed the navigation; and although the owner proved that he lived at a distance, and did not know what was being done, and although he had given directions to the contrary, he was held criminally liable for the nuisance. Here the wrong was common to all the public, and the remedy by indictment was the only remedy. This was the ground of the decision. Libel, as I

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have already observed, does not belong to this class, but to the ordinary class of offences against the person. I am, therefore, of opinion that the direction to the jury was imperfect, and the verdict wrong, and consequently that the verdict ought to be set aside.

MELLOR, J.—The question for consideration in this case arose upon the trial before Grove, J., of a criminal information against the defendants, who are the proprietors and publishers of the *Portsmouth Times and National Gazette*, for a libel on a Mr. Howard contained in that newspaper. On the trial the verdict passed against all the defendants, who were all found guilty of the offence. There had been a former trial of the case, in which the judge had directed a verdict to be entered against all the defendants on the ground that they did not, upon the evidence then given, come within the true intent and meaning of the 7th section of the 6 & 7 Vict. c. 96. A rule for a new trial was thereupon obtained by Mr. Cole, and afterwards made absolute, on the ground that the judge ought not to have withdrawn the question from the jury, but should have left it to them, upon that evidence, with a suitable direction. The only respect in which my present judgment differs from that I gave in the former case is that I think that I was wrong in holding that the judge was right in withdrawing the evidence from the consideration of the jury and deciding it himself. On the last trial Grove, J. left the question to the jury, with a careful and elaborate summing up, and they thereupon found a verdict of guilty against all the defendants. Upon the hearing of the present rule Mr. Cole, for the defendants, made several objections to the verdict, viz., on the ground that it was against the weight of the evidence, and on the ground of misdirection by the judge. On the argument against that rule, the only substantial question turned upon the construction of the statute 6 & 7 Vict. c. 96, entitled, "An Act to amend the law respecting defamatory words and libel." The recital to the first section shows the object of the Act to have been for the better "protection of private" character, and for more "effectually securing the liberty of the press," and for better preventing "abuses in exercising the said liberty." The section upon which the matter more particularly depends is the 7th, which enacts "that whensoever upon the trial of an indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumption of publication, against the defendant by the act of any other person, by his authority it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care and caution on his part." I regret that there exists a difference of opinion amongst the judges who heard the argument as to the true construction of this statute. I have read the very able arguments of my Lord Chief Justice and my brother Lush with care, and regret that I am not able to come to the same con-

clusion with them. I admit the force of their reasoning, but it does not satisfy all the difficulties in the construction which press upon my mind. I am of opinion therefore that the rule should be discharged, and that the verdict should stand. The several defendants were joint proprietors of the newspaper in question, and each contributed his assistance in various departments to the management and publication of the same, but neither of them took part in the editorial management of it; but that department was by the defendants devolved upon a manager named Green, who, it appeared on the evidence, had procured the article in question to be written, and had caused it to be inserted in the newspaper. The defendants were not any of them aware of the insertion of the offensive article in the newspaper until after the publication thereof, when their attention was called to it. I do not stop to refer to the subsequent sale of a single paper, or to the steps taken on the part of the defendants to stop the further circulation of the newspaper, when they became aware of the libel. I consider that the evidence of Mr. Green, the manager appointed by the defendants, raises the real question in the case, and it is upon that evidence that I base my opinion. Mr. Green, being called as a witness on the part of the defendants, said that, "they (the defendants) leave it entirely to my discretion what I shall put in the paper; they appointed me with general authority to conduct the paper, they have never taken notice of my articles one way or the other, they have never found fault with the articles." It is difficult to conceive of an authority more complete or unfettered; and it appears to me that by so constituting Mr. Green, the editor, with such authority, the defendants must be taken to have authorised the insertion of all matter appearing in the newspaper in question. The recital in the statute defines one main object of it to have been "the better protection of private character," as well as the "more effectually securing the liberty of the press," which I concede to be a perfectly reasonable object. The words are, "Whenever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge." Now, I think that these words may well be satisfied by permitting the defendant to negative in point of fact the presumption which before arbitrarily prevailed, and could not be controverted on the trial by giving in evidence the real facts. For instance, as proprietors they might have expressly forbidden the insertion of some specific libel in the paper, and have ordered it to be destroyed; nevertheless, by accident, or by design, or misunderstanding, it might have got into the newspaper against their order and without their consent. Again, they may have expressly forbidden the editor to insert any article of a defamatory character without their express authority, but the editor

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may nevertheless have inserted it in the newspaper without their knowledge. Other circumstances may be imagined in which libels may have inserted in the newspaper, and for which, but for this section the defendants would have been liable as upon an actual authority. But to apply it to a case like the present, where the fullest authority was given to insert any article at the discretion of the editor without restriction as to their character and nature, seems strangely at variance with the recited object of the statute—viz., “for the better preventing abuses in the exercise of such liberty;” but it was contended that the statute did protect proprietors of newspapers in all cases in which they had not specially known or authorised the manner of the specific libel. I fear that if such a construction of this section should prevail, the other objects recited in the statute—viz., “the better protection of private character” and preventing abuses in exercising the said “liberty of the press” would be utterly lost sight of, and it would become more properly speaking, a statute for the greater protection of newspaper proprietors, and for the more effectual encouragement of the sale of newspapers containing libellous articles. Another main consideration which influences my opinion, is the increased difficulty which it introduces, and imposes upon a party seeking redress in a case of a scandalous libel, in which the obtaining of damages can afford no adequate satisfaction. It is true that the cases of *Reg. v. Walter* and of *Colburn v. Patmore* which established the criminal liability of a newspaper proprietor for the acts of his servants, were supposed to have inflicted a great hardship upon the defendant, which cases were doubtless in the mind of the framer of the statute in question; yet it by no means follows that he contemplated the giving of an entire immunity from liability on the part of the newspaper proprietors; and it appears to me, from the recitals in the statute and the nature of its provisions, that it was not intended absolutely to reverse the rule laid down by Lord Kenyon in *Reg. v. Walter*. I cannot help thinking that clearer and simpler language and different recitals would have been adopted had such been the case. It is argued, however, that, unless such be the meaning of the section it will be entirely nugatory. I cannot bring myself to that view of the statute; but, as I have already said, I think that many cases may be suggested in which the objects of the statute may be satisfied, without so construing the words used. Should, however, such construction prevail, it will throw the greatest obstacles in the way of a prosecutor desiring to proceed by indictment or information for a serious and scandalous libel; how is the person defamed to proceed to punish the libeller? If he attacks the proprietor as the person who profits by the libel, and therefore apparently the right person to proceed against, he may be met by evidence on the trial, that such proprietor had nothing to do with the actual management of the newspaper, but merely provided the capital

necessary for its establishment, and his only interference the receiving of the profits arising from the sale. How is the prosecutor to find out the actual libeller, whether proprietor, editor, or correspondent, and how is he to prove his identity? Surely if the wide construction contended for had been intended by the framer of the Act, provision would have been made for the registering of the editor or author who was responsible for the libel, and for enabling the prosecutor to discover who he was. Even then it might be that the editor was a man of straw, without the means of satisfying any fine or the costs of any prosecution which on conviction might be imposed upon him; he might be a person alike destitute of character and principles, hired only for his skill in defamation, and his capacity to create a wretched craving to read the scandalous and libellous contents of the paper which he was hired to conduct. This is a consideration which much influences my opinion, seeing that no means are provided in a criminal case by discovery by interrogatories or otherwise for ascertaining the real author or contributor. In fact, the result must be, that however scandalous the libel, the person defamed can have no real redress criminally against the actual libeller as he, being upon the hypothesis a man of straw, can pay neither fine nor costs. It may, however, be asked what is then the provision "for more effectually securing" the "liberty of the press," if the meaning of the section be limited, as suggested by me? I find a ready answer in the provisions of the 2nd and 6th sections, which enable a person charged criminally with libel, to plead that the substance of the libel is true; and in case of action that it was inserted without malice, and that before action he had tendered an apology, which provisions form a most material alteration in the law heretofore in force with regard to the law of libel. On the trial of the present information, no doubt could be suggested that a presumptive case of publication by authority of the defendants had been established, and the only question which then remained was whether the evidence given on behalf of the defendant negatived the presumption that the libel in question had been published without their authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on their part. I am of opinion that the evidence given on the part of the defendants wholly failed to establish such a defence under the statute, but, on the contrary, warranted the jury in finding them guilty on both divisions of the proposition which were essential to their defence. An unlimited discretion and authority had been, in fact, conferred on Mr. Green, the editor, to insert articles of whatever nature and character he might deem expedient to insert, and their consent was involved in the same authority; and therefore unless it can be successfully contended, that the authority, consent, or knowledge, mentioned in the exempting clause of the section, requires the prosecutor to prove that the particular specific libel must have been actually authorised,

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known, and approved, in each case, I cannot but think that the evidence sufficed to warrant the conclusion at which the jury arrived. It was observed during the argument, that as a general rule, an authority to an agent to conduct a commercial business, does not extend to enable such agent by implication to make his principal liable for a crime committed by such agent. Now this may be true as a general proposition, where a crime is committed by an agent, beyond the scope of his authority, without the consent of his principal, but it has no application to a business or commercial speculation of this description, where, in the very nature of things, it is essential to the prosperity of the paper, that articles of very various character and description should be inserted. Indeed the cases of *Rex v. Walter* and *Colbourn v. Patmore* show that this must be so, as the decisions in those cases proceeded upon the principle that in such a case the liability of the proprietor and superior resulted from the act of the servant. In fact Mr. Green, in the management of the editorial department, was the *alter ego* of each of the defendants, and was in fact authorised to insert in every issue of the newspaper, whatever matter he considered suitable and likely to increase its circulation, and the insertion of the libel in question in the newspaper was clearly within the scope of his authority. As I cannot believe that the object of the statute was to require prosecutors, in such cases, to prove an actual authority or consent to the specific libel, I cannot do other than express my opinion that the jury were justified in finding the defendants guilty. I am further of opinion, although it is not necessary in order to discharge this rule to decide it, that there was a question upon the evidence fit for the consideration of the jury, whether the publication in question arose from want of due care or caution on the part of the defendants, and I think that the jury might well think that the defendants failed to show that it did not so arise. It appears to me that for proprietors of a newspaper to devolve upon an editor the entire control and unfettered discretion as to what articles he shall insert without requiring him to abstain from the insertion of all defamatory matter, or without making some provision for supervision by the defendants, who are the parties interested in the speculation, does exhibit a want of due care or caution on their part. The object of an editor is generally to make the paper sell and to become a profitable speculation to his employers, and unhappily the insertion of sensational or defamatory articles has too often a great tendency to bring about so profitable a result. I think, therefore, there was evidence that the defendants did not use due care and caution in entrusting Mr. Green with unfettered authority, in the management of the editorial department of their newspaper, and I am of opinion, therefore, that on all grounds the rule should be discharged.

COCKBURN, C.J.—The question in this case is one of considerable importance as regards the law of libel, inasmuch as it involves the construction which is to be put on the 7th section of



the 6 & 7 Vict. c. 96; an enactment passed to relieve the proprietors of public journals from the heavy responsibility, so far as the criminal law was concerned, which rested on them before in respect of libellous matters published in such journals, without their authority, knowledge, or consent. The state of the law which this enactment was intended to remedy, was in my opinion inconsistent with the first and common principles of justice, and one which was discreditable to the legislation of this country. It had been laid down authoritatively, at a time when perhaps less liberal views as to the liberty of the press prevailed, that the proprietor of a public journal though absent, and wholly ignorant of matters inserted in the journal by his editor, was nevertheless responsible, not only civilly, but also criminally, if the matter so inserted were libellous—in direct contravention, I cannot but think, of the fundamental principle that, to constitute guilt there must be a *mens rea*—an intention to violate the law. It was to remedy this state of the law that the statutory enactment, 6 & 7 Vict. c. 96, s. 7, was passed, with which we have here to deal. It provides that when “evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care and caution on his part.” The question is as to what will satisfy the exigency of the terms by which immunity is thus given to the proprietor on the condition of his showing that he has not given authority for the publication of the libel. In the first place, would it be enough for the defendant to show that he had not specifically authorised the insertion of the article or matter complained of, if it should appear that he had given authority to insert matter whether libellous or innocent, at the discretion of the editor? I answer unhesitatingly in the negative. But it appears to me equally untenable to say that, because a proprietor intrusts the conduct of a public journal to the plenary discretion of an editor, he thereby gives authority to the editor to commit a breach of the law by the insertion of libellous matter. In the first place, let me ask if the principal in appointing and giving authority to his editor were expressly to prohibit the insertion of any libellous matter in the paper, would not, so far as the question of authority is concerned, such express prohibition be sufficient to satisfy the statute? I think the answer must be in the affirmative; for what, unless he himself superintends the insertion of every article, in which case the statute would be useless, can the proprietor do more? But surely the prohibition not to violate the law is impliedly involved in every service in which an agent is employed, and in which the law may possibly be broken by such agent. Take the case of an agent employed to buy goods on which a duty is payable, and who, to benefit his employer, buys smuggled goods unknown to the

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employer. The agent would be criminally liable, the employer would not. As it seems to me, the proprietor of a public journal, who gives general authority to the editor he employs is entitled to assume that the editor, knowing the law as well as himself, will take care for his own sake as well as for the sake of his employer to keep within the law by inserting nothing which would bring himself within the reach of the law, either criminally or civilly, or make his principal liable in damages which he again would be liable to make good to his employer. I am at a loss to see to what cases the statutory provision in question would be applicable if not to this. It is notorious that in many, perhaps in the majority of instances, public journals are carried on for the benefit of proprietors, who find the necessary capital, by editors employed by them, and to whom the conduct of the paper is committed without any immediate control or interference of the principal. In my opinion it was intended to exempt principals so circumstanced, if able to satisfy a jury that they had not authorised, directly or indirectly, the insertion of libellous matter, from being held criminally liable. It is to be observed that in both the striking cases referred to by my brother Lush, those of *Rex v. Walter and Colburn v. Patmore*, as also in the case of *Rex v. Gutch* (Moo. & Mal. 433), the conduct of the journal had been left by the proprietor, as in this case, to the management of an editor, while the proprietor, absent at a distance, had been ignorant of the fact of the libellous matter having been published. It was to meet such cases, I cannot doubt, that this section of Lord Campbell's Act was directed. It was a remedial Act, and one which as bringing the law into harmony with general principles, should receive a liberal interpretation. I think we should be defeating what was intended to be its operation if we were to hold that a general authority given to an editor to manage a public journal involved an authority to publish libellous matter, and that a proprietor giving such authority still remained criminally liable for a libel, without specific authority expressed or implied, for publishing such libel or any consent or knowledge thereto on his part. It is true that the terms in which the authority was given to the editor in the present case at first sight seem large. According to the evidence of the editor, the defendants "left it entirely to his discretion what he should put into the paper. They gave him general authority to conduct the paper; they never took notice of his articles, one way or the other." But what is this beyond what is implied in the general authority given to an editor by every proprietor? What is this more than *in extenso* what would be implied in a general authority to conduct the paper? In my opinion it would be to put much too strained and unwarranted a construction on such a general authority to treat it as giving a licence to the editor to publish libels in a paper he was employed to conduct. I have no hesitation in saying where a general authority is given to an editor to

publish libellous matter at his discretion, it will avail a proprietor nothing to show that he had not authorised the publication of the libel complained of. It is equally clear that though in the authority originally given to the editor no licence to publish libellous matter may have been contained, still such an authority may be inferred from the conduct of the parties, as for instance from the fact that other libels have been published in the paper which have come to the knowledge of the proprietor, and without his remonstrance or interference, or the removal of the editor, from which the assent of the proprietor might well be inferred. I do not, therefore, feel the apprehension which has been expressed of the mischief which would result from the immunity which newspaper proprietors would derive from holding them free from criminal responsibility when they employ an editor with general authority to conduct the paper. The immunity would quickly cease if they suffered the paper to become the vehicle of calumny. There are journals as to which no jury would hesitate to say that the editors were authorised by the proprietors to invent or give currency to libel. Protection is further afforded to individuals and the public by the immunity afforded by the statute being conditioned on the exercise of due care and caution on the part of the proprietor. Many circumstances might be held by a jury to amount to the absence of the care and caution thus required. The employment of an incompetent or untrustworthy editor, or one who has before been proceeded against for libel, total omission ever to look at the paper to see in what manner it was conducted, or, as in this very case, the omission, though taking part in the publication of the paper, to insist on having articles of a doubtful tendency submitted for approval, might be deemed by a jury sufficient to disentitle a proprietor to the protection of the statute. It must always be borne in mind also that it is only on the penal responsibility of the proprietor that a limit is thus placed. His liability to damages in a civil action remains as before. No hardship is therefore imposed on the individual prosecutor, who, in the eye of the law, prosecuted not on his own behalf but on that of the public, and who may still hold the proprietor liable in damages, and if he pleases, prosecute the editor as the publisher of the libel. This being the view I take of the statute, it seems to me that the direction of the learned judge at the late trial was defective in not explaining to the jury that a general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law. I agree that, as regards two of the three defendants, there may have been evidence to go to the jury of knowledge and consent on their parts, as it appears that they became aware of the article in question before the sale of the paper had come to an end, and took no steps to stop the issue of the remaining numbers of the paper, and therefore might be held to

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have known of and consented to the publication of the libel in such later papers. The jury might also possibly have held that, as regards the two defendants who were on the spot, and who might therefore have looked at the articles before the paper was published, there was a want of due care and caution, as required by the statute. But I agree with my brother Lush that the verdict must have proceeded on the ground of authority, as the jury have included in their finding the third partner, who was absent at a distance on account of illness, and to whom none of the other circumstances can at all apply, and as to whom, taking the view of the case which I do on the subject of authority, I think there was no case to go to the jury. I concur with my brother Lush therefore in holding that the rule for a new trial must be made absolute.

*Rule absolute for a new trial.*

Solicitors for the prosecution, *Gregory, Rowcliffe, and Co.*, for *John Howard*, Portsmouth.

Solicitors for the defence, *Ford and Ford*, for *Feltham*, Portsea.

## PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

*Tuesday, November 26, 1878.*

(Before the Right Honourable the PRESIDENT.)

GROVE v. GROVE. (a)

*Appeal from decision of magistrates—Alimony—Custody of children—Matrimonial Causes Act, 1878 (41 Vict. c. 19), s. 4.*

THIS was the first appeal from a magistrates' decision under the 4th section of the Matrimonial Causes Act, 1878 (41 Vict. c. 19).

Sect. 4 enacts :

If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of the statute twenty-fourth and twenty-fifth of Victoria, chapter one hundred, section forty-three, upon his wife, the Court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her

(a) Reported by L. D. POWLES, Esq., Barrister-at-Law

husband ; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty ; and such order may further provide :

- (1.) That the husband shall pay to his wife such weekly sum as the Court or magistrate may consider to be in accordance with his means, and with any means which the wife may have for her support, and the payment of any sum of money so ordered shall be enforceable, and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation ; and the Court or magistrate by whom any such order for payment of money shall be made, shall have power from time to time to vary the same on the application of either the husband or the wife, upon proof that the means of the husband or wife have been altered in amount since the original order, or any subsequent order varying it shall have been made :
- (2.) That the legal custody of any children of the marriage under the age of ten years shall, in the discretion of the Court or magistrate be given to the wife.

Provided always, that no order for payment of money by the husband, or for the custody of children by the wife, shall be in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned ; and that any order for payment of money or for the custody of children may be discharged by the Court or magistrate by whom such order was made upon proof that the wife has since the making thereof been guilty of adultery ; and provided also, that all orders made under this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice.

James Grove the appellant in the present case was a currier, carrying on business at Leamington, who had been convicted by the local bench on the 11th day of September last, of an aggravated assault upon his wife, Jane Ann Grove. The magistrates had made an order under the above section of the Matrimonial Causes Act, 1878, for alimony at the rate of 3*l.* a week, and giving the wife the legal custody of the only child of the marriage. The order for alimony was based upon evidence given at the hearing as to the defendant's income. The present appeal was brought by the defendant, who sought to set aside the order as to alimony on the ground that the amount awarded to the wife was excessive, that the amount fixed upon by the magistrates as a fair estimate of the defendant's annual income was against the weight of evidence. It was further sought by the appellant's counsel to introduce words into the order limiting the duration of the wife's custody of the child to the age of ten years. The words of the Act being "any children of the marriage under the age of ten years." Further application on behalf of the appellant for time to file further affidavits was refused.

*Middleton*, for the appellant.

*Inderwick*, Q.C., for the respondent.

The PRESIDENT (Sir James Hannen).—This is the first occasion on which I have had to review a decision of the magistrates under the Matrimonial Causes Act of the recent session. It would be unfortunate if it were often necessary for me to investigate decisions by magistrates under this Act, especially as it confers upon them a peculiar jurisdiction for the express purpose of cheapening proceedings. The machinery upon which I have to act in the present case is most imperfect, and it appears to me that the proper course would have been to ask the magistrates at

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the time for an adjournment for the purpose of producing further evidence. Even now, after he has had the opportunity of stating his case in an exact and formal manner, the appellant admits a net annual income of 235*l.*, apart from his business. In calculating the amount of profit derived from his business, it is obviously right to allow a considerable margin for the defendant's conscience, and, after making such deductions as he pleases, the defendant only says that his business does not produce 150*l.* per annum. Taking it at 140*l.*, this sum, added to 235*l.*, would make an annual income of 375*l.* It appears that he has two places of business, and that his books are kept in an irregular manner. The magistrates (with a knowledge of the local circumstances of the case that I cannot possibly have) have come to this conclusion that his annual income is 100*l.* more than he puts it at. I must, therefore, reject his application. The order for the custody of the children will have the effect given it by the Legislature, and no other. Any change in the property of the wife will be a subject for an application to the magistrates who made the order. The appeal must be dismissed with costs.

Solicitors for the appellant, *Field* and *Roscoe* (for *Field*, Leamington).

Solicitors for the respondent, *Burton*, *Yeates*, and *Hart* (for *Overell and Son*, Leamington).

## QUEEN'S BENCH DIVISION.

*Saturday, Nov. 16, 1878.*

(Before LORD COLERIDGE, C.J., and MELLOR, J.)

PAUL AND ANOTHER (apps.) v. SUMMERHAYES (resp.). (a)

*Trespass—Foxhunting—Assault—Justification—1 & 2 Will. 4, c. 32, ss. 2, 31, 35.*

*A huntsman in fresh pursuit of a fox is not justified in forcing an entry upon land against the will of the owner.*

*The appellants, while in fresh pursuit of a fox, came to land managed by the respondent for his father. The respondent warned them off, and endeavoured to prevent their going upon the land. The appellants thereupon attempted to force an*

(a) Reported by ARTHUR H. POYSER, Esq., Barrister-at-Law.

*entry, and, in so doing, committed an assault, for which they were convicted and fined.*

*Held that the conviction was right, as foxhunting was no justification of a trespass, which the respondent therefore lawfully resisted.*

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THIS was a case stated by justices under 20 & 21 Vict. c. 43.

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Justification—  
Fox hunting.

On the 28th day of December, 1877, the information of Thomas Summerhayes, the above-named respondent, against Henry Paul and Charles George Elers, the appellants, charging them together in the same summons with assaulting and beating the said respondent at Curry Mallett, in the county of Somerset, on the 2nd day of November, 1877, was heard at a petty sessions holden at Ilminster, in the said county.

It was proved that the respondent lived with his father and attended to his business for him (the father being afflicted), and that a portion of the farm occupied by the father consisted of a field called "The Nineteen Acres," in the parish of Curry Mallett aforesaid. That, on the 2nd day of November, 1877, about midday, the respondent was alone at work in that field when the appellants, who were out with the Taunton Vale foxhounds, were on horseback and riding slowly across an adjoining field, in the occupation of Thomas Zouch, towards "The Nineteen Acres." That "The Nineteen Acres" is east of that adjoining field, and separated from it by a hedge, a bank about two feet high, and a shallow ditch outside the bank, all which belong to "The Nineteen Acres." That the hounds crossed Thomas Zouch's field as far as the said bank, and then turned into a covert which skirts "The Nineteen Acres" and Thomas Zouch's field on the north side. That the respondent got on the bank of "The Nineteen Acres" at a gap near the covert, and, when the appellants were within ten yards of him, said, "Gentlemen, I forbid you to come on this land." The appellant Henry Paul said, "Come on, gentlemen, it is the Prince of Wales's land," and tried to ride up the bank, and the respondent put his hand against the horse, and turned the horse back. That a second time the said Henry Paul tried to ride up the bank, and again the respondent pushed the horse back. That the said Henry Paul upon that struck the respondent upon his head with a riding whip more than once. That the respondent then took up a stone, and the said Henry Paul got off his horse, and went into "The Nineteen Acres," and caught hold of the respondent, and a struggle ensued. That during the struggle the appellant Charles George Elers rode into "The Nineteen Acres," and up to and against the respondent, and said, "If you throw that stone I will knock you down." That the respondent then caught hold of the bridle of the said Charles George Elers's horse (to protect himself), and Elers struck at respondent with his hunting whip, and the respondent let go the bridle, and thus avoided the



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blow. There was no evidence to satisfy the justices that a fox had been seen on the day in question in "The Nineteen Acres."

It was contended on behalf of the said appellants (*inter alia*), that the defendants were, with others, in fresh pursuit of a fox started on other land, and were entitled, under 1 & 2 Will. 4, c. 32, s. 35, to ride over "The Nineteen Acres" without interruption, and that the respondent, therefore, committed the first assault.

That the appellants were in the exercise of a *bonâ fide* claim of right or interest to enter "The Nineteen Acres" as Prince of Wales's land, and also by force of the aforesaid statute, and that consequently jurisdiction of the justices was ousted.

And that, under the circumstances of the case, the respondent was not justified in using force to prevent the appellants entering "The Nineteen Acres."

The justices were of opinion that the 1 & 2 Will. 4, c. 32, s. 35, does not make a forcible entry on land lawful, but merely declares that under certain circumstances a person shall not be liable to be summoned under that Act for trespass in pursuit of game. That there was no colour of title or interest in the appellants to oust their jurisdiction, and that an occupier of land is justified in using such force as may be necessary to remove a person from such land after he has been forbidden to enter; and they convicted the appellant Henry Paul in the penalty of twenty shillings and costs, and the appellant Charles George Elers in the penalty of ten shillings and costs.

The questions of law submitted by the justices for the opinion of the court were :

Whether the 35th section of 1 & 2 Will. 4, c. 32, prevents an occupier resisting an entry on his land of persons hunting after they have been forbidden by him.

Whether the appellants had such a reasonable claim of title or interest as would oust the jurisdiction of the justices.

Whether the respondent was, under the circumstances, justified in resisting the entry on "The Nineteen Acres" after he had forbidden the entry and it was persisted in.

If the court should be of opinion that the said conviction was legally and properly made, and the said appellants are liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information is to be dismissed.

The 1 & 2 Will. 4, c. 32, contains provisions against trespassing in pursuit of game. By sect. 2 "game" is defined for the purposes of the Act to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards; and by sect. 31 are added woodcocks, snipe, quails, landrails, or conies. Then the following exception is made by sect. 35 :

Provided always, and be it enacted, that the aforesaid provisions against trespassers and persons found on any land shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of

any deer, hare, or fox already started upon any other land, nor to any person *bond fide* claiming and exercising any right or reputed right of free warren or free chase.  
 . . . .

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*Cole*, Q.C. for the appellants.—There was ample evidence here that appellants were in fresh pursuit of a fox. That being so, they had a perfect right to go upon anyone's land. *Gundry v. Feltham* (1 T. R. 334) is an authority directly in point. Possibly the decision in that case was founded on the idea that a fox was a noxious animal, but that does not alter the law. If it was lawful, then it has not ceased to be so because those who now join in the pursuit of a fox do so in order to obtain the pleasures of the chase. This is *damnum absque injuria*: (*Mitten v. Fandrye*, Popp. 161.) This view is supported by the dictum of Brooke, J. in Year Book, 12 Hen. 7, pl. 9; and by 21 Hen. 7, pl. 28. The right existing at common law has been protected by 1 & 2 Will. 4, c. 32, sect. 35.

*A. Charles*, Q.C. for the respondent.—The provisions of the Game Act do not apply to this case at all, as foxes are not included in the definition of game. The real point for the decision of the Court is whether a foxhunter, hunting for his own diversion, has the right to go across the land of another after being warned off by the owner. The principle governing such a case is so obvious that it could not have possibly been contested except for the decision in *Gundry v. Feltham* (*ubi sup.*). But that case was only decided upon demurrer, and by the pleadings it was admitted that a fox was a noxious animal, and that the course pursued was the only way of killing the fox; but that is a very different thing from hunting merely for the sake of diversion, and this distinction was clearly drawn by Lord Ellenborough in the *Earl of Essex v. Capel* (Locke on the Game Laws, p. 45), a case tried at Hertford Assizes in 1809. There he says, "These pleasures are to be taken only when there is the consent of those who are likely to be injured by them; but they must necessarily be subservient to the consent of others." The dictum of Brooke, J., alluded to on the other side, does not support the decision in the case which was before him. *Baker v. Berkeley* (3 C. & P. 32) is an authority distinctly in my favour. If, as is admitted, the appellants were hunting for diversion, the conviction must be upheld, and it may be so upheld without reversing the decision in *Gundry v. Feltham* (*ubi sup.*), where the facts before the Court were of a different nature.

Lord COLERIDGE, C.J.—This is an appeal against a conviction upon a summons for beating and assaulting the respondent at Curry Mallett. It appears that the respondent managed his father's business of a farmer, and on the day in question he was managing his father's business in a field called "The Nineteen Acres." On that day the neighbouring foxhounds were hunting close by "The Nineteen Acres," over which the two appellants, in company with other gentlemen, proposed to ride while in pursuit of the fox. The respondent tried to prevent this, whereupon one of the appellants struck him upon the head with a

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riding whip more than once ; a struggle then took place, and the other appellant came up. The respondent seized hold of the second appellant's horse, in order to prevent being knocked down, when the second appellant struck at him with his hunting whip, but did not hit him. Upon these facts the magistrates convicted both the appellants, and inflicted fines upon them. The question for us to decide is whether, under the circumstances, such conviction was right. Now, one of the first points raised is as to the effect of the 1 & 2 Will. 4, c. 32, but I must confess I do not quite understand the meaning of the question, for it seems to me that statute has really no application to this case. The 35th section merely provides that certain of the foregoing provisions shall not extend to persons in fresh pursuit of a fox ; but, as the exception is limited to the previous provisions of the Act, and as those provisions contain nothing about foxes, but relate only to game, and as sect. 31 has no application here, the point supposed to arise under sect. 35 cannot arise at all. It is not argued now that the appellants had any reasonable claim of interest in the land such as would oust the magistrate's jurisdiction, so we come to what is the real question in this case—viz., whether the respondent was, under the circumstances, justified in resisting the entry on the "Nineteen Acres" after he had forbidden the entry and it was persisted in. It has been popularly supposed that foxhunting may be exercised over the lands of any person without his consent, and even against his will, and, in support of this argument, the case of *Gundry v. Feltham* (*ubi sup.*) has been cited. I am of opinion that no such right exists. Foxhunting is, no doubt, a most valuable and interesting sport, but it must be carried on in subordination to the general rights of mankind, and the ordinary and well-established laws of property, according to which you cannot go on to a man's land without his leave and against his will. Questions of this kind do not often arise, because in the great majority of cases reasonable terms are made with those upon whose land it is necessary to go, and compensation is provided for any damage done ; but when such questions do arise they must be treated according to the ordinary rules of law. As far as I am aware, there is no law which allows a whole field of foxhunters to ride over a man's grounds or fields against his will. Such a supposition arises from a misunderstanding of *Gundry v. Feltham* (*ubi sup.*) ; but that case is different to the present one, for there the plaintiff admitted upon the pleadings that what was done was "the only way and means" of killing and destroying the fox, and, indeed, Buller, J. bases his judgment upon that very ground ; and that is the only point which *Gundry v. Feltham* decides, and, no doubt, where it is admitted that no other means exist for destroying the fox, such a defence may prevail. But that decision afterwards came under the consideration of a very great authority in the case of the *Earl of Essex v. Capel* (*ubi sup.*), decided by Lord Ellenborough when sitting at Nisi Prius, but he had had his attention called to the case previously, and so had

had an opportunity of looking into the authorities upon the subject. In the case of the *Earl of Essex v. Capel* the evidence showed clearly that foxhunting was pursued for the excitement and accompaniments of the chase, although incidentally a fox might be killed; and Lord Ellenborough, during the course of the case, pointed out that there was a very great distinction between foxhunting pursued as a pleasure and foxhunting pursued for the good of the common weal and in order merely to destroy a noxious animal: and he goes on to say that there is very considerable doubt whether that even would justify a trespass, as it was a doctrine that was probably based on a mere *obiter dictum* of Brooke, J. (Year Book, 12 Hen. 8, pl. 9), which was supposed to decide a point upon which it had no bearing whatever. The dictum of Lord Ellenborough appears to me to be perfectly correct, but it is not necessary for me to decide now whether the pursuit of a fox for the sole purpose of killing a noxious animal would justify a trespass; it is enough for me to show that the supposed authority of the case in the Year Books and of *Gundry v. Feltham* (*ubi sup.*) does not conflict with the decision of Lord Ellenborough. For these reasons, I am of opinion that a man has a perfect right to forbid a field of foxhunters entering upon his land in pursuit of pleasure, and if they persist in doing so he is justified in endeavouring to prevent their entry. In this case the conviction was right, and the appeal must be dismissed.

MELLOB, J.—I am of the same opinion. I was unaware that the 1 & 2 Will. 4, c. 32, had defined game for the purposes of that Act. If the word “game” had included foxes the application of sect. 31 might have had unpleasant consequences, from which foxhunters could only have been extricated by the terms of sect. 35; but, under any circumstances, sect. 35 could only apply to the previous provisions of the Act, and could not justify a trespass in the course of hunting a fox. That question has been fully discussed by Lord Coleridge, and with his observations I entirely agree. Mr. Cole did not argue that the sole object, or the main object, of foxhunting was to destroy a noxious animal, and no one can suppose that ladies and gentlemen of position go down to Melton to kill vermin. I entirely concur with Lord Coleridge, that the authority of Lord Ellenborough is not only consistent with law, but with all experience and common sense. We are justified, therefore, in saying the conviction must stand.

*Appeal dismissed with costs.*

Solicitors for appellants, *Kingdon and Cotton*, for *Jolliffe*, *Crewkerne*.

Solicitors for respondent, *Reed and Lovell*, for *Reed and Cook*, *Bridgwater*.

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## COMMON PLEAS DIVISION.

Nov. 18 and 25, 1878

(Before Mr. Justice GROVE.)

BENT v. THE WAKEFIELD AND BARNSELY UNION BANK. (a)

*Reward for information leading to apprehension of criminal—Surrender of criminal—Information of surrender and confession sent by constable—Communication of material facts for first time.*

*A reward was offered to any person giving such information to the superintendent of police at D. as should lead to the apprehension of G. G. gave himself up to the chief constable at E., who, after searching the Police Gazette, and satisfying himself as to G.'s identity, telegraphed to the superintendent at D., "Do you hold warrant for the apprehension of G. for forgery?" and received a telegram in return, "I still hold warrant for G. and should like him to be apprehended." Upon that the chief constable at E. apprehended and charged him and he was ultimately convicted.*

*Held, that the chief constable at E. was not entitled to the reward, G. having himself given the information leading to his apprehension.*

**T**HIS was an action tried before Grove, J., at the last summer assizes, at Bristol, and reserved by him for further consideration. It was an action brought by the plaintiff, who was the chief constable for Exeter, to recover a reward offered by the defendants for any information that should lead to the apprehension of one William Glover.

The facts proved at the trial are tully set out in the judgment.

Nov. 18.—*A. Charles*, Q.C. (*St. Aubyn* and *Austin* with him) for the plaintiff.—The reward is offered to a person to do a specific thing which has been done. *England v. Davidson* (11 Ad. & E. 356) is an authority in favour of the plaintiff. There are numerous examples of these actions being maintained by constables.

*H. T. Cole*, Q.C. and *Templer* for the defendant.—Such an

(a) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

action as this is against public policy. The case of *England v. Davidson*, cited on the other side, is really in our favour. Lord Denman, C.J. says there: "I think there may be services which the constable is not bound to render; and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law unless the grounds for so deciding were very clear." This was clearly a case within his duty; he was bound to apprehend Glover. [GROVE, J.—I should like some authority for that; he is entitled to do it, but is he bound to?] Upon the undisputed facts of this case, the plaintiff did nothing to earn the reward; nobody can be entitled to it. [GROVE, J.—Bent was a carrier of information to Airtion which led to Glover's apprehension.] The criminal gave the information himself. In Comyn's Digest it is laid down that a constable may arrest on suspicion. The result showed that he ought to have arrested Glover, and if he did not, he can take no advantage by not having done so. In *Cowles v. Dunbar* (2 C. & B. 565) Abbott, C.J. says: "A constable is obliged to act if there is a reasonable charge of felony." They cited also *Smith v. Moore* (1 C. B. 438), *Thatcher v. England* (3 C. B. 254), *Lancaster v. Walsh* (4 M. & W. 16), *Snowdon upon Constables*, p. 152.

*A. Charles*, Q.C. in reply.—The result of *Thatcher v. England* and the other cases cited is that the first person other than the criminal who gives the information is the person entitled to the reward. The head-note to *Thatcher v. England* is: "The defendant, who had been robbed of jewellery, published an advertisement, headed '30*l.* reward,' describing the articles stolen, and concluded thus: 'The above sum will be paid by the adjutant of the 41st Regiment, on recovery of the property and conviction of the offender, or in proportion to the amount recovered.'" A., a soldier, on the 10th day of June, informed his sergeant that B. had admitted to him that he was the party who had committed the robbery, and the sergeant gave information at the police station. On the 14th the plaintiff, a police constable, learning from one C. that B. was to be met with at a certain place, went there and apprehended him. The plaintiff, by his activity and perseverance, afterwards succeeded in tracing and recovering nearly the whole of the property, and in procuring evidence to convict B.: Held, that the plaintiff was not, but (*per* Tindal, C.J., and Cresswell, J.) that A. was, the party entitled to the reward." [GROVE, J.—The distinction is between information given to the authorities or the person offering the reward, and mere conversation with casual persons.] In *Smith v. Moore* (*ubi sup.*) the prisoner was in custody; here the fact whether he was in custody or not is in dispute; but eliminate that, and the two cases are on all fours. It is admitted that Airtion could not claim the reward; but that Bent could is clear, if he had not been a constable, and that makes no difference. Referring to the advertisement, which constitutes the terms of the contract

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here, Bent was the “person or persons giving such information to Mr. W. Airton, superintendent of police, Dewsbury, or to Mr. W. Halls, superintendent of police, Wakefield, as” led “to the apprehension of the said William Glover.” [Grove, J.—Suppose one Jones had given information to Bent, and then Bent had written to Airton, would not Jones have been entitled to the reward?] Probably in that case Bent would be the agent of Jones. A police constable is protected in arresting a criminal on suspicion—a layman is not protected. [Grove, J.—Here the man yields himself up to the law.]

*Our. adv. vult.*

November 25.—GROVE, J.—This case was tried before me at Bristol, at the last summer assize. It was an action for a reward of 200*l.*, offered in a published handbill by the defendants in the following terms:—“200*l.* Whereas, on the 26th day of June last, William Glover, shoddy and mungo dealer, of Ossett, absconded from Ossett, after committing various forgeries on several manufacturing firms in the West Riding of Yorkshire: Notice is hereby given that the above reward will be paid to any person or persons giving such information to Mr. W. Airton, superintendent of police, Dewsbury, or to Mr. W. Halls, superintendent of police, Wakefield, as will lead to the apprehension of the said William Glover.—West Riding Police Office, Wakefield, the 27th day of July, 1877.” The plaintiff’s case, on which my judgment must be founded, was shortly stated as follows:—On the 30th day of November, 1877, a person presented himself at the police office, Exeter, and on the plaintiff, the chief constable for Exeter, being sent for, the man—who was, in fact, Glover—said, according to the plaintiff’s evidence, “You hold a warrant for me: I am wanted for forgery.” The plaintiff asked his name, and who he was. He said, “You know already, and hold the warrant.” Some further conversation took place. The plaintiff said he appeared out of his mind, and told him he had been drinking, and recommended him to go to an hotel. The plaintiff left him in a private room, searched the *Police Gazette*, and found the name “William Glover, wanted for forgery.” He got him to take off his hat, and said, “I satisfied myself, after reading the *Police Gazette*, when he took his hat off.” The plaintiff then telegraphed to Mr. Airton, superintendent, at Dewsbury, “Do you hold warrant for the apprehension of William Glover for forgery? Wire back. Answer paid;” and received a telegram in return, “I still hold warrant for Glover, and should like him to be apprehended.” Upon that the plaintiff apprehended and charged him, and he was ultimately convicted. For the defendants evidence was given to prove that Glover gave his name before the telegram was sent; and also that he was taken into custody before it was sent. I left these two questions to the jury, and they found that Glover was not in custody before the telegrams; but could not agree, and, after

being locked up, were discharged as to the first question, counsel agreeing that they would accept the finding on the second for the purposes of the case. The point reserved and argued before me on further consideration was, whether or not the plaintiff was entitled to the reward. For the plaintiff it was argued that he was the person to be taken to have given the information leading to the apprehension, within the meaning of the handbill. For the defendants, that the criminal, Glover, had given the information himself; and, secondly, that, on grounds of public policy, the plaintiff was not entitled to the reward. I am of opinion that the defendants are entitled to judgment. It was not contended that the mere fact of being the person who first communicated with Airton would be sufficient alone to entitle the plaintiff to succeed, supposing the information to have been given to the plaintiff by other than the criminal himself; indeed, the very able and learned counsel for the plaintiff said, in answer to me, though I do not wish and ought not to tie him to his admission, that, if Glover had given information to Airton, Airton would have been entitled to the reward. I think he could hardly have avoided such admission. Airton and Halls, it seems to me, are persons mentioned as proper to be communicated with, but if the information had been given direct to those offering the reward, and had led to the apprehension, I should consider that sufficient. The criminal himself, and not the constable, was, I think, here the person who gave the information which led to the apprehension. In *Lancaster v. Walsh* (4 M. & W. 16), where no person was named to receive the information, but the reward was to be given "on application to the defendant," Parke, B., says: "It seems to me that any communication to the constable whose duty it was to search for the offender was within the terms of the handbill, although there was no proof of a communication to the defendant himself." In the same case it is held by the same learned judge that "the party who first gave the information, and he alone, is to have the benefit." And Alderson, B., says: "Information means the communication of material facts for the first time." It appears to me that in the present case the first information given to a person authorised to act was that given by the criminal himself; and although he, on grounds of public policy, might not be entitled to the reward, still, where a constable, who may apprehend a criminal, is the mere channel of communication, and only makes inquiries for the purpose of satisfying himself, he is not the person giving the information within the true meaning of the advertisement; the apprehension is not the consequence of the constable's information, but of the criminal surrendering himself to justice. To use the words of Tindal, C.J. in *Thatcher v. England* (3 C. B. 254, 263), "the clue once found, the plaintiff in apprehending Walker did no more than his ordinary duty." It was argued that, in the case of *Thatcher v. England* (*ubi sup.*), the first information was given by the criminal, and yet the

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person who communicated that information was held to be the party entitled. But there the communication by the criminal was not to any one authorised to act in apprehending or procuring his apprehension, but to a person whom seemingly he considered a friend, for the purpose of borrowing money to enable him to go to London to dispose of the property stolen. The communication by the criminal there was not in the nature of information to be acted upon for the purpose of his apprehension, and, had the person to whom it was made kept the secret, would not have led to the conviction. In that case it was also held that, though the first police constable to whom the communication was made by his activity and perseverance succeeded in tracing and recovering nearly the whole of the property, and in procuring evidence to convict the thief, he was not entitled to the reward. The cases mainly relied on for the plaintiff were *England v. Davidson* (11 Ad. & E. 856), and *Smith v. Moore* (1 C. B. 438). The first of these cases bears more on the question of public policy than on the point to which I have hitherto adverted. It was there held, on demurrer, that the fact of the person giving the information being a constable did not necessarily disentitle him on the ground of want of consideration, it being his duty to discover and apprehend felons, or on grounds of public policy. In that case, the averments in the declaration were more general, viz., that the plaintiff did give such information as led to the conviction, and in the plea that the plaintiff was and is a constable of the district, and that it was his duty to give every information which might lead to the conviction, and to apprehend him. The short judgment of the Court, delivered by Lord Denman, is as follows: "I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear." All that that case decides is that a constable, as such, is not disentitled to a reward of this description, or necessarily disentitled as against public policy. In *Smith v. Moore* (*ubi sup.*) the plaintiff, a police constable then temporarily suspended, apprehended a burglar, who, after his apprehension, voluntarily confessed; the constable was held entitled to the reward. There is in that case the obvious distinction from the present, that the confession was made after apprehension effected by the person claiming the reward, and who by his suspicions, and apprehending on the strength of them, had already done much, and in the judgment of the court enough to earn it. On the question of public policy I am bound by the case of *England v. Davidson* (*ubi sup.*) so far as the judgment in that case extends; and, although there may be some distinction as to this point between that case and the present, yet, in deciding a case on the ground of public policy, the decision should be based on some broad principle, and one capable of general application. I am unable to see any general principle other than that argued in *England v. Davidson*

(*ubi sup.*), viz., that a constable is bound by his duty, the duty of his office, to seek for criminals, and to use his utmost efforts to bring them to justice. There are strong arguments of expediency, touching the administration of justice and the interests of the State, why constables should not be allowed to receive rewards. The expectation of rewards would offer great temptation to delay an active search, by which delay the criminal might escape, or, in a case like the present, to delay taking into custody a criminal who gives himself up, so that the constable might appear to use exertions to procure complete information and for that to claim the reward. There would also be a temptation, particularly to those constables in the detective service, to look to bribes or to seek promises of reward from persons anxious to recover their property, and unless such were offered to be inert in their efforts. But, although the judgment in *England v. Davidson* (*ubi sup.*) does not enter upon these questions, I must assume they were present to the minds of the judges who decided that case. Whatever my own opinion may be, it seems to me that I cannot without over-subtle refinement apply to this case any general principle of public policy which is not involved in that case, and that the decision, if it is to be reviewed, must be reviewed in a court of appeal. The first point is sufficient to decide this case; and I give judgment for the defendants with costs.

*Judgment for the defendants.*

Solicitors for the plaintiff, *Olarke, Rawlins, and Olarke*, for *H. D. Barton*, Exeter.

Solicitors for the defendants, *Torr, Janeway and Co.*, for *Stewart and Son*, Wakefield.

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## N O R T H E R N   C I R C U I T.

LIVERPOOL WINTER ASSIZES, 1879.

*Thursday, February 13, 1879.*

(Before Mr. Justice LINDLEY.)

REG. v. HUGH CAREY. (a)

*Apprehension by a police constable without having warrant in his possession—Murder reduced to Manslaughter—Galliaid v. Laxton (2 B. & S. 363) ; Cod v. Cabe (45 L. J., M. C. 101) ; Reey v. Cox (12 Cox C.C. 4) referred to.*

THE prisoner was indicted for the murder of Sewell, a police-serjeant at St. Helen's. It appeared that on the 31st day of October, 1878, one Pickavance, the foreman at the manufactory at which the prisoner had worked, obtained a warrant from the justices for the apprehension of the prisoner on a charge of threatening to shoot him. This warrant lay upon the desk at the police-station at St. Helen's, and a man who was not the prisoner had been apprehended, and subsequently discharged, owing to a mistake in his identity.

Early in the morning of the 1st day of November, the prisoner, while passing along a street with something evidently buttoned up in his coat, was stopped by the deceased, at that time in uniform and on duty, who seized him by the collar and demanded to know what he had in his coat. Some angry conversation and scuffling ensued, whereupon the prisoner drew a revolver from his trousers pocket and shot Sewell, the police constable, dead.

By the St. Helen's Improvement Act, 1869, sect. 257, power is given to constables to stop, search, and detain persons reasonably suspected of knowingly having or conveying anything stolen or unlawfully obtained.

*Higgin, Q.C. and Shand, for the prosecution.*

*Commins and Lumb for the prisoner.*

At the close of the case for the prosecution, *Commins*, for the defence, submitted that there was no case of murder to go to the jury.

LINDLEY, J.—The arrest by Sewell was illegal. Cases may be imagined where the absence of a warrant might be no defence, as

(a) Reported by R. T. TIDSWELL, Esq., Barrister-at-Law.

where the murder was premeditated. It is abundantly clear that if the deceased was arresting the prisoner on Pickavance's charge, he was exceeding his duty by acting without a warrant; if he was arresting him under the powers given by the local Act, there is no evidence from which the jury could infer that the deceased reasonably suspected the prisoner of the possession of stolen goods, and it lay on the prosecution to give such evidence.

REG.  
v.  
HUGH CARRY.  
—  
1878.  
—  
*Murder—  
Illegal apprehension.*

*Prisoner convicted of manslaughter, and sentenced to twenty-five years penal servitude.*

## N O R T H E R N C I R C U I T.

MANCHESTER WINTER ASSIZES, 1878.

(Before Mr. Justice MANISTY.)

LIVERPOOL SPRING ASSIZES, 1879.

(Before Mr. Justice LINDLEY.)

REG. v. ADAMS. (a)

*Indictment framed in two counts; In the second count one assignment was that the prisoner swore that she had not had connection with a "man." Held, by Manisty, J., that the evidence of only one man could be received; by Lindley, J., after consulting with Lord Justice Thesiger, that the evidence of several men, alleging that they had had connection was prisoner, with admissible.*

THE prisoner was indicted for perjury arising out of the evidence she gave at the May Salford Sessions, 1878, before W. H. Higgin, Q.C., chairman, in a charge of indecent assault against a fellow railway passenger.

*Leresche and Nash for prosecution.*

*Addison for prisoner.*

The prisoner, Annie Adams, had given evidence at the May Salford Sessions, 1878, to the effect that she had been indecently assaulted in a railway carriage between Reddish and Manchester,

(a) Reported by R. T. TIDSWELL, Esq., Barrister-at-Law.



REG.  
v.  
ADAMS.  
—  
1878.  
—  
*Indecent  
assault—  
Evidence.*

by a man who was convicted and sentenced to two years' hard labour.

At the trial for perjury at Manchester Winter Assizes, 1878, before Manisty, J., it was objected, and the objection held good, that under the indictment the evidence of only one man that he had had criminal connection with the prisoner previous to May last could be received.

After two days' trial the jury did not agree and the prisoner was discharged on bail.

At the second trial, at Liverpool Spring Assizes, 1879, the same objection was taken but overruled, Mr. Justice Lindley, after consulting Lord Justice Thesiger, states that, without an amendment, he would receive the evidence of more than one man, but would grant a case for the Court of Criminal Appeal if necessary.

After a second two days' trial, and the jury had been locked up for several hours, they were discharged and the prisoner again admitted to bail.

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## COURT OF CRIMINAL APPEAL.

*Friday, Dec. 6, 1878.*

(Before KELLY, C.B., MELLOR, J., DENMAN, J., LINDLEY, J., and  
HAWKINS, J.)

REG. v. WALTER BROWNLOW. (a)

*Larceny Act (24 & 25 Vict. c. 96), s. 75—Agent receiving moneys—Direction in writing to apply the same—Embezzlement.*

*The prisoner was an agent employed to sell goods on commission, and as soon as he received moneys from customers he was to remit them to his employers. During the employment, the prosecutor wrote to the prisoner, "We will send H., B., and P. their bills at the end of the month and the same day that you receive the money from the customers you must remit it to us. We will attend to your order, as our arrangements were to remit as soon as you received it, as you said they would not pay much before the 20th of each month."*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*Held, that this letter was not a direction in writing as to the application or disposition of moneys received by the prisoner within the meaning of sect. 75 of 24 & 25 Vict. c. 96.*

REG.  
v.  
WALTER  
BROWNLOW.

1878.

*Embezzlement  
—Evidence.*

CASE reserved for the opinion of this Court by Fry, J.

The indictment contained three counts:—

The first charged the prisoner with having received 12*l.* 12*s.* on the 7th day of February, 1878, from one Edward Wood, and with having converted the same to his own use.

The second count charged the prisoner with having received a sum of 8*l.* 14*s.* 9*d.* on the 2nd day of March, 1878, from one Birkhamshaw, and having in like manner converted the same to his own use.

The third count charged the prisoner with the receipt of a sum of 11*l.* on the 18th day of February, 1878, from one Hilton, and having converted the same to his own use.

The questions for decision arise under the 75th section of the 24 & 25 Vict. c. 96.

It appeared from the evidence that Edward Thorneycroft carried on business in partnership with his brother at Chesterton in Staffordshire, as a brickmaker. That he engaged the prisoner to act as an agent in Derby in October 1877. That the duties of the prisoner were to sell goods on commission at 5 per cent. That as he received the moneys from the customers, he was to remit them to his principals.

It appeared further that in the course of business he sent orders to his principals, who accordingly supplied the goods to the customers.

It was proved that the three sums mentioned in the indictment had been received by the prisoner in respect of goods supplied by his principals, and that the same had not been paid or accounted for to his principals, but had been converted by him to his own use.

On the 26th day of November, 1877, Thorneycroft wrote to the prisoner a letter, the material parts of which are as follows:—

We will send Mr. Hand, Mr. Blood, and Mr. Pemberton, their bills at the end of the month, and the same day that you receive the money from the customers you must remit it to us. We will attend to your order, as our arrangements were to remit as soon as you received it, as you said they would not pay much before the 20th of each month.

Upon this state of facts two questions arose: First, whether the prisoner had been intrusted with the three sums of money mentioned in the indictment or any of them within the meaning of the 75th section of the 24 & 25 Vict. c. 96; secondly, whether the letter of the 26th day of November, 1877, was, within the meaning of the same section, a direction in writing to apply, pay, or deliver the said three sums or any of them.

The prisoner was found guilty subject to this case.

I submit the questions for the decision of the Court for Crown Cases Reserved.

Reg.  
v.  
WALTER  
BROWNLOW

1878.

Embezzlement  
—Evidence.

Fry, J. appended to the case the following memorandum :

“The questions turn upon the construction of the 75th section of the 24 & 25 Vict. c. 96. It seems to me open to question whether the prisoner can be considered to have been intrusted with the money.

“1. The general drift of the 75th section seems to show that it is intended to apply rather to agents to pay than to agents to receive money.

“2. The direction in the present case to pay to the principal shows that the principal did not treat himself as having received the money. Can a man who has not been in possession of money trust another with it ?

“3. If the direction had been to receive from ‘A.’ and to pay to ‘B.’ the case might have been different ; because there the transaction may be deemed to be of a twofold character, viz., first, a constructive receipt of the money by the principal ; secondly, an intrusting of the same money to the agent to pay. But here the direction being simply to pay to the principal, the second part of the transaction which would have brought it within the scope of the section is wanting.

“4. The language of this section with regard to the agent being intrusted must be contrasted with the language of the 68th section, where money in the position of that now in question is described as having been delivered to, or received, or taken into possession by the person receiving it.

“5. It appears to me doubtful whether the Legislature were minded to make the misapplication of all moneys received by one person to the use of another, in respect of which a written direction had been given, criminal.

“See *Reg. v. Tatlock* (2 Q. B. Div. 157 ; 13 Cox C. C. 328), particularly the judgment of Amphlett, B.”

*Horace Smith* for the prisoner.—The conviction cannot be sustained. The indictment against the prisoner was not for embezzlement, but for converting moneys which had been intrusted to him with a direction in writing to apply the same, under the 24 & 25 Vict. c. 96, s. 75. The learned counsel, having read Fry, J.’s observations on the memorandum to the case, was stopped by the Court.

*Vesey Fitzgerald* for the prosecution.—The conviction was right. The case finds that the prisoner was an agent to the prosecutors, and the letter of the 26th day of November, 1877, from the prosecutors was a written direction to him as to the application of all moneys he might receive for them. Sect. 75 says : “Whosoever having been intrusted,” it does not say “by the employer,” but leaves it generally, “an agent having been intrusted ;” and here the prisoner was intrusted with the money by the prosecutor’s customers. Then the letter supplies the direction what he was to do with it, viz., to remit the money the same day that he received it to his employers. [DENMAN, J.—The letter amounts to no more than an intimation that as soon as

he has received any moneys he is to remit them on the same day.] The direction in this letter is quite as specific as that in *Reg. v. Christian* (L. Rep. 2 C. C. R. 94; 12 Cox C. C. 502). [MELLOR, J.—No; there the prisoner received a specific sum of 336*l.* to apply in payment of certain shares. This was embezzlement if a criminal offence at all.]

KELLY, C.B.—I am of opinion that this conviction must be quashed. In the cases cited the prisoners were intrusted by the prosecutors with moneys, with specific directions how to apply them; but in the present case there was no written direction at all which specifically applies to the moneys mentioned in this indictment.

MELLOR, J.—I am of the same opinion. This is not a case within the 24 & 25 Vict. c. 96, s. 75. The reasons given by Fry, J. show very satisfactorily that the prisoner ought to have been acquitted.

DENMAN, J.—I am of the same opinion. The only question is whether the letter was a direction in writing within the meaning of sect. 75 of the 24 & 25 Vict. c. 96? I think it is very doubtful whether the letter was ever intended to apply to any other than the three named persons' accounts. At all events it is ambiguous, and, in the absence of any finding by the jury to that effect, I do not feel justified in holding that it did so apply. The arrangements referred to in the latter part of the letter may have been by parol for all we know.

LINDLEY, J.—I am of the same opinion. Two questions are reserved for us: (1) Whether the prisoner had been intrusted with any of the sums of money mentioned in the indictment within the meaning of the 75th section. Upon that question I am of opinion that he was not. (2) Whether the letter was a direction in writing to apply, pay, or deliver any of them within sect. 75. I think it was not; it is too ambiguous, and I am disposed to think that it referred to the three customers previously mentioned in the letter.

HAWKINS, J.—I am of the same opinion. The letter is ambiguous in its terms, but, assuming that it does apply to all sums of money received by the prisoner on the prosecutor's account, the case is not within sect. 75, which only applies in my judgment where the agent has been intrusted by his employer with money accompanied by a direction in writing how to apply it, and not where the agent receives the money from a third person on behalf of his master as in this case.

*Conviction quashed.*

REG.  
v.  
WALTER  
BROWNLOW.  
—  
1878.

*Embezzlement  
—Evidence.*

## COURT OF CRIMINAL APPEAL.

*Saturday, Nov. 16, 1878.*

(Before KELLY, C.B., DENMAN, J., LINDLEY, J., MANISTY, J., and  
HAWKINS, J.)

REG. v. TREADGOLD. (a)

*Jurisdiction—Venue—Embezzlement.*

*It was the duty of the prisoner, a commercial traveller, to remit daily to his employers, who resided in London, the moneys which he collected, without reduction. The prisoner, on the 1st and 2nd of March, 1878, collected at Newark two sums of money which he did not remit or account for till the first week in April, when one of his employers went to Grantham, where the prisoner resided, saw him, and taxed him with receiving moneys and not accounting for them. The prisoner then and there handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. There was no evidence that the prisoner returned from Newark (which is within easy access of Grantham) to Grantham on either of the days or at what times of the days he received the two sums of money. He was indicted and convicted at the borough of Grantham Quarter Sessions for embezzling the above two sums of money :*

*Held, that the conviction was bad, as there was no evidence of any embezzlement within the borough of Grantham.*

CASE reserved for the opinion of this Court by the Recorder of the borough of Grantham, Notts.

The prisoner was tried before me at the Sessions held for the borough of Grantham, on the 23rd day of July, 1878, on an indictment charging him with having in the borough of Grantham embezzled the several sums of 2l. 5s. and 6l. 11s. 6d. respectively, the property of Nathan Defries and another, his masters.

The prisoner was employed by the prosecutors as a commercial traveller, under a written agreement, by which he was bound to remit daily, without any reduction whatsoever, any moneys collected by him on their account.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

On the 1st and 2nd day of March, 1878, the prisoner being then at Newark, in the course of his occupation as commercial traveller, received on account of his masters the sum of 2*l.* 5*s.* from one H. Slater, and the sum of 6*l.* 11*s.* 6*d.* from Thomas Edwards respectively. He never accounted to them for the money, or informed them that he had received it except as hereafter stated.

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v.  
TREADGOLD  
—  
1878.  
—  
*Embezzlement*  
— *Venue.*

It was proved that the prisoner resided at Grantham, but there was no evidence to show that he returned to Grantham on either of the days, or at what time on the respective days he received the said several sums of money.

It was within the knowledge of the jury that Newark was fourteen and three-quarter miles from Grantham, and within easy access of it by train, although no formal proof was given of the fact.

In the first week in April, 1878, Nathan Defries, one of the prisoner's employers, proceeded to Grantham and had an interview with the prisoner there; and, on taxing him with receiving money on account of his employers which he had not accounted for to them, the prisoner handed to the said Nathan Defries a list of amounts he had received and not accounted for, in which list the two items of 2*l.* 5*s.* and 6*l.* 11*s.* 6*d.* appeared.

Upon the above facts it was contended, on behalf of the prisoner, that the indictment failed of proof, the embezzlement, if embezzlement there was, having been committed at Newark in the county of Nottingham, where the money was received and appropriated by him, and not at Grantham in the county of Lincoln.

On the part of the prosecution it was contended that the venue was well laid at Grantham, the offence having been commenced at Newark and completed at Grantham; and that, by virtue of the statute 7 & 8 Geo. 4, c. 64, s. 12, a person may be tried either in the county in which he began, or that in which he completed the offence.

I overruled the objection, holding that, as the prisoner lived at Grantham, but a short distance from Newark, there was evidence from which the jury might infer that the prisoner would return home from Newark on the day he received the money; and that, as it was his duty to remit daily the money he collected, the failure to do so was sufficient evidence of embezzlement, and I declined to withdraw the case from the jury.

The prisoner was found guilty, and I passed sentence upon him, reserving the point as to the venue, and admitting him to bail pending the decision of it by the court.

The question reserved is whether, under the circumstances above disclosed, the venue was well laid in Grantham. If the Court should be of opinion that it was, the conviction to stand; or, if of the contrary opinion, to be quashed.

WM. JOHN EWINS BENNETT.

*W. J. Smith* for the prisoner.—There was no evidence that the



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v.  
TREASURER.  
—  
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—  
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*Venue.*

prisoner returned to Grantham before the first week in April, and the receipt of the moneys was a month previously at Newark. The alleged embezzlement consisted in the fact of non-accounting, but at Grantham he did account for the receipt of the moneys. It is true that it was his duty to have remitted daily the moneys he had collected without any reduction, and it does not appear that he was ever at Grantham between the time of receiving the money and the first week in April. [HAWKINS, J.—The only statement in the case bearing on this is, that the prisoner lived at Grantham. DENMAN, J.—Where did the prisoner feloniously appropriate the moneys to his own use?] From the case it is impossible to say, but it does not appear that he did so appropriate them at Grantham. [KELLY, C.B.—It lies on the prosecution to show that the embezzlement took place at Grantham.] The cases of *Reg. v. Rogers* (14 Cox C. C. 22; 47 L. J. 11, M. C.), and *Reg. v. Murdoch* (2 Den. C. C. 298; 5 Cox C. C. 360) were then cited. In the present case the evidence pointed to an embezzlement at Newark, if there was any embezzlement at all, but there was no evidence of any embezzlement at Grantham.

No counsel appeared to argue for the prosecution.

KELLY, C.B.—This conviction must be quashed. There was no evidence at all which showed the completion of the offence of embezzlement at Grantham. It is quite consistent with the facts stated in the case that there was probably an act of embezzlement at Newark, but even that is not clear. The case states that the prisoner resided at Grantham, and that there was no evidence to show that he returned to Grantham on either of the days he received the several sums of money. It further states that in the first week of April one of the prisoner's employers proceeded to Grantham and had an interview with the prisoner, and taxed him with receiving moneys which he had not accounted for to them, and that the prisoner handed to him a list of amounts he had received and not accounted for, in which list the two items charged in the indictment appeared, and there the evidence stops. It is impossible to say upon these facts that there was any evidence of embezzlement at Grantham, and therefore under the circumstances the conviction must be quashed.

DENMAN, LINDLEY, MANISTY, and HAWKINS, JJ., concurred.

*Conviction quashed.*

## COURT OF CRIMINAL APPEAL.

*Saturday, Nov. 16, 1878.*

(Before KELLY, C.B., DENMAN, J., LINDLEY, J., MANISTY, J., and  
HAWKINS, J.)

REG. v. THOMAS HUGHES. (a)

*Larceny—Recent possession—Evidence for the jury.*

*A bag was left by the owner on a Saturday night near to a place where the prisoner and two other persons were at the time. The prisoner passed by the place on his way home, and shortly afterwards one of the other two persons followed in the same direction. That person and the prosecutor then met the prisoner coming back to his home from the opposite direction, and being questioned he denied all knowledge of the bag, and said that he had been in the neighbouring wood for firewood. The wood, the prisoner's cottage, and some disused farm buildings near it were then searched, without success. On the Monday morning, the bag was found in a hayloft in one of the disused farm buildings near to the highway. There was no door to it and passers-by had easy access to it. The prisoner was then taken into custody for stealing the bag, and said to the constable, after previously denying he had taken the bag, "I suppose I shall get a month for this," and made use of some other words of no more definite meaning.*

*The chairman left all the facts to the jury as evidence from which they might infer that the prisoner had had possession of the bag, and directed them, if they found so, to treat the case as one of recent possession.*

*Held, that the Chairman's ruling was wrong, and that he ought to have directed an acquittal.*

**A**T the General Quarter Sessions of the peace for the county of Denbigh, holden at Denbigh on the 11th day of April, 1878, the prisoner was indicted for stealing a bag containing a number of articles, the property of one David Vaughan.

It was proved at the trial that a few minutes before the bag

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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—  
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Recent posses-  
sion—  
Evidence.*

was missed, which was about 10 p.m., on Saturday, the 12th day of January, 1878, the prisoner and two other men, named Thomas Bagnall and William Bagnall, were near a wall by the road side on which it had been placed by the prosecutor's wife while she went into a shop close by, but none of the three men were seen in possession of the bag at that or any other time.

The prisoner passed the wall, where the bag was placed, on his way home, and shortly afterwards William Bagnall followed him in the same direction.

After passing the prisoner's cottage, William Bagnall, and the prosecutor, David Vaughan, met the prisoner coming back to his cottage from the opposite direction. When questioned, the prisoner denied all knowledge of the bag, and stated that he had been into a neighbouring wood to fetch firewood.

It was proved on cross-examination that the owner of this wood allowed his workpeople to collect firewood for their own use there, and also that the prisoner had formerly worked for him, but was not doing so at the time in question.

William Bagnall and the prosecutor David Vaughan, in company with the prisoner, searched the wood, the prisoner's cottage, and some disused farm buildings at the back of his cottage for the bag, which could not be found.

On the Monday following the bag was, however, found by the police constable in an old hayloft, in one of the disused farm buildings mentioned above.

These disused buildings, including the hayloft, belonged to an adjoining farm in the occupation of a person of the name of Griffith, and were not connected with the prisoner's cottage or garden otherwise than that he, as well as others, had access to them. The hayloft had no door, and was near the high road.

The prisoner was a farm labourer, and had worked in the neighbourhood all his life, but there was no evidence of his having worked for the aforesaid Griffith or on his farm.

When the bag was found, the constable took the prisoner to the police station at Ruabon, a distance of between four and five miles. On their way there the prisoner, having previously denied to the constable that he had committed the robbery, said, "Well, it's no use, I suppose. I suppose I shall get a month for this. What do you think?" He added, "Some people get more than others, and afterwards said, "It's very odd; people get transported, and when they come back they begin the same things again."

I told the jury that in a case of larceny, after proving that the goods were stolen, proof that they were found in the possession, or under the control of the prisoner shortly afterwards, and that he did not give a satisfactory account of the manner in which he came by them, is good presumptive evidence of the prisoner having stolen them. I directed the jury to apply this rule to the present case, and to take the evidence and the whole of the circumstances, together with the prisoner's state-

ments into their consideration, and say whether he was guilty or not guilty of the offence charged against him.

The counsel for the prisoner took exception to this direction on the ground that there was no evidence to go to the jury to show that the bag was ever in the possession or under the control of the prisoner, so as to raise a presumption of his guilt from his not giving any account of it.

I declined to alter my direction to the jury, being of opinion that, under all the circumstances, there was evidence sufficient to justify my direction, and the application of the above rule so as to raise a presumption of the prisoner's guilt.

The jury found him guilty, and he was admitted to bail to appear to receive judgment at the Quarter Sessions of the Peace to be holden for the county of Denbigh when called upon.

The opinion of the Court for the Consideration of Crown Cases Reserved is requested whether there was any evidence which ought to have been left to the jury that the bag had been in the possession or under the control of the prisoner, so as to make the aforesaid rule applicable to this case.

If the Court should be of opinion that there was any such evidence for the jury, the conviction to stand; if of a contrary opinion, to be quashed.

THOMAS HUGHES, Chairman.

No counsel appeared to argue on either side.

KELLY, C.B.—The question reserved for our decision is whether there was any evidence which ought to have been left to the jury that the bag had been in the possession of the prisoner, or under the control of the prisoner, so as to make the rule alluded to applicable to this case. We can find no evidence that the bag had been in the possession of the prisoner or under his control; and therefore the conviction must be quashed.

DENMAN, J.—I am of the same opinion. If the case had been left in a different way to the jury there might have been something for them to consider, viz., the statements made by the prisoner to the police constable. But with respect to the direction of the Chairman, that the jury might proceed to consider the case on the basis of the doctrine of recent possession, there was no evidence at all of any possession by the prisoner. The jury must, therefore, have been misled, and the conviction cannot be sustained.

MANISTY, LINDLEY, and HAWKINS, JJ. concurred.

*Conviction quashed.*

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v.  
THOMAS  
HUGHES.

1878.

*Larceny —  
Recent pos-  
session —  
Evidence.*

## COURT OF CRIMINAL APPEAL.

*Saturday, Nov. 16, 1878.*

(Before KELLY, C.B., DENMAN, J., LINDLEY, J., MANISTY, J.,  
and HAWKINS, J.)

REG. v. ORTON AND OTHERS. (a)

*Prize fight—Combatants with gloves on—Sparring match.*

*Divers persons assembled in a room, entrance money being paid, to witness a fight between two persons. The combatants fought in a ring with gloves, each being attended by a second, who acted in the same way as a second at prize fights. The combatants fought for about forty minutes with great ferocity, and severely punished each other. The police interfered and arrested the defendants, who were among the spectators.*

*Upon the trial of an indictment against them for unlawfully assembling together for the purpose of a prize fight, the Chairman directed the jury that, if it was a mere exhibition of skill in sparring, it was not illegal; but, if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize fight, whether the combatants fought in gloves or not, and left it to the jury to say whether it was a prize fight or not.*

*Held, that the jury were properly directed.*

THE following case was reserved by Sir Frederick Thomas Fowke, Bart., Chairman of the General Quarter Sessions of the Peace for the county of Leicester:

John Orton, William Burrows, Alfred Greenfield, Henry Wilkinson, Charles Orton, George Orton, James Westerman, Edward Bodycott, William Cave, Thomas Hall, George Hardy, Henry Stokes, Joseph Collins (*alias* Tug Wilson), and William Henry Neale were tried before me at the General Quarter Sessions of the peace for the county of Leicester, held on the 15th day of October, 1878, for assembling together for the purpose of a prize fight.

The indictment contained six other counts, three of them for

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

assaulting police constables in the execution of their duty, and three other counts for common assaults on the same constables.

It was given in evidence that the defendants had assembled, together with others to the number of a hundred and upwards, in a room in a vacant building which they had taken possession of without the consent of the owner; that one shilling entrance was charged to each person; that then the door was barricaded to prevent access by the police or any other person; that the two defendants Orton and Burrows were the combatants. Each was stripped to the waist, a space roped in for a ring, and each combatant was attended by his second, on whose knee he sat in the intervals during the fight, and was sponged and fanned by him after the usual custom in prize fights.

It was proved by an eye-witness that the men fought with great ferocity, in the words of this witness, "like bulldogs;" that each was severely punished, and that the fight had lasted for nearly forty minutes when the police came up, brought there by information of what was going on, and by a large and disorderly crowd who had assembled on the road outside the building attracted by what was going forward.

The police, after great resistance, during which the assaults before mentioned were committed, forced an entrance into the room through the windows, when those present attempted to escape in any way they could, by door or window. The two combatants and the other twelve defendants were, however, arrested.

It was found that each combatant was severely punished, and one of them had his ear bitten through. They were highly exasperated with each other, each calling the other a coward, and taunting each other with unfair fighting so much that, even after they were arrested and in the custody of the police, they were with difficulty prevented from closing with each other and renewing the fight.

The fight was for money, and one of the defendants told the policeman who had him in charge, "You have done me out of 7l."

The learned counsel for the defence contended that this was a sparring match fought in gloves, according to well-known rules, and, on the authority of the case of *Reg. v. Young* (10 Cox C. C. 371) (a) was no offence at law.

I directed the jury that this was a correct definition of the law, if it were a mere exhibition of skill in sparring; but that, if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law, and a prize fight, whether the combatants fought in gloves or not, and I left this

(a) *Reg. v. Young* was tried before Bramwell, B., at the Central Criminal Court, and the marginal note is this: "There is nothing unlawful in a sparring exhibition unless the men fight on until they are so weak that a dangerous fall is likely to be the result of the continuance of the game. Therefore, except in the latter case, death caused by an injury received during a sparring match does not amount to manslaughter."

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v.  
ORTON AND  
OTHERS.  
—  
1878.  
—  
*Prize fight*



R.M.G.  
v.  
ORTON AND  
OTHERS.

1878.

*Prize fight.*

question to the jury: "Was this a sparring match or a prize fight?"

The jury had the gloves used in the fight before them, and retired to consider their verdict, and on their return they found that it was a prize fight, and that the prisoners were guilty.

They also found the defendants, Collins, Westerman, and Bodycott guilty of assaulting the police in the execution of their duty.

The learned counsel contended that I was wrong in leaving the question to the jury whether or not it was a prize fight; that, as the men fought in gloves, I ought to have directed the jury that it was therefore a mere sparring match, and no indictable offence.

I respited the sentence, releasing the defendants on bail for their appearance to receive and abide by the sentence of the Court at the next Epiphany Sessions if the Court be of opinion that I was right in thus leaving the case to the jury.

The case is, whether the question "Was this a prize fight or not?" was rightly left to the jury; or was the fact that the fight was with gloves sufficient to prevent the same being an indictable offence?

FREDK. THOS. FOWKE, Chairman.

No counsel appeared to argue on either side.

KELLY, C.B.—The question in this case is, whether the prisoners were guilty of the offence of unlawfully assembling together for the purpose of prize fighting. The jury found that this was a prize fight. No doubt the combatants wore gloves; but that did not prevent them from severely punishing each other. There can be no doubt that, upon the facts, the conviction ought to be affirmed.

DENMAN, J.—I am of the same opinion. The jury examined the gloves in their private room, and, having the fact proved that the combatants severely mauled each other, they found rightly that this was a prize fight. The question was entirely one for the jury.

LINDLEY, J., MANISTY, J., and HAWKINS, J. concurred.

*Conviction affirmed.*

## Ireland.

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### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

*Dec. 3 and 4, 1878.*

(Before MAY, C.J., O'BRIEN and FITZGERALD, JJ.)

REG. v. PATRICK McNAMARA. (a)

*Necessity for view in a criminal case—Certiorari—The Winter Assizes Act, 1876 (40 & 41 Vict. c. 57)—Winter Assize County not contiguous to county where crime committed—Neighbouring county.*

*Under the Winter Assizes Act, 1876, it is not necessary that the Winter Assize County should be physically contiguous to the county in which the alleged crime for which the prisoner is indicted was committed. The fact of a view of the locus in quo being necessary for the fair trial of a prisoner is not sufficient ground for removing the indictment into the Queen's Bench Division by certiorari, when the locus in quo is situate in a different county from the Winter Assize County (dissentiente: O'Brien, J.)*

*Semble, that the Judge at the trial should in the exercise of his judicial discretion postpone the case, to enable the trial to take place in the county where a view could conveniently be had.*

**PATRICK McNAMARA** was indicted at the Spring Assizes, 1878, for the county Clare for the murder of Patrick Kearney. The prisoner was then twice tried, and the jury on each occasion disagreed. At the following Summer Assizes he was again tried; on this occasion the Crown counsel applied that the jury should view the premises where the alleged murder was committed. The view took place, and the jury disagreed. It was now proposed to have the prisoner put on his trial at the Winter Assizes for 1879, to be held pursuant to an Order in Council in the county of the City of Cork. A conditional order

(a) Reported by **CECIL R. ROCHE**, Esq., Barrister-at-Law.

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was obtained for a writ of *certiorari* to remove the indictment into the Queen's Bench Division, on the grounds: first, that it is necessary and convenient, for the fair and efficient trial of the issue, that the jury who are to try the issue should view and examine the place at which and the neighbourhood and locality in which the offence was alleged to have been committed; secondly, that it would be illegal and inexpedient for a jury empanelled at the ensuing Munster Winter Assizes to view and examine the place, neighbourhood, and locality; thirdly, that a fair and satisfactory trial of the issue cannot be had, except by a jury empanelled in the county of Clare; fourthly, that the county of the city of Cork is not a neighbouring county to the county of Clare within the meaning of the Winter Assizes Act of 1876; fifthly, that a jury of the county of Cork is not a jury of the Munster Winter Assizes county within the provisions of the Winter Assizes Act of 1876; sixthly, that by reason of the premises it would be inexpedient and not convenient that the issue should be tried at the ensuing Munster Winter Assizes to be held in the county of the city of Cork. The county of Clare is not contiguous in any part to the county of the city of Cork. The prisoner stated in his affidavit, "That the evidence in the case consisted entirely of minute and complicated circumstantial evidence, relating very much to the nature of the country round, to the height of walls and hedges, to whether from the lie of the ground, certain points are in view of other points, and to the direction and extent of certain elevations and depression of ground in the neighbourhood, and that it would be utterly impossible for a jury to understand or accurately weigh the evidence without carefully examining and viewing the locality. That it was absolutely necessary for the fair and impartial trial of the case, and of the most vital importance for his defence, that the jury who were to try him should view and carefully examine the place of the alleged murder, and the neighbouring locality to which the evidence referred. That the place where the murder was alleged to have taken place is a remote part of the county of Clare, and it would be utterly impossible to send a jury from the city of Cork to view the locality. The Crown Solicitor stated in his affidavit that there was continuous railway communication between the city of Cork and Crusheen, a locality within a few miles of the scene of the murder; and that it would be possible for a jury to leave the city of Cork in the morning, visit the scene of the murder, and return to the city of Cork the same day.

*Holmes*, Q.C. (with him, *J. G. Gibson*), for the Crown, showed cause against the conditional order. They relied on the Order in Council declaring the county of the city of Cork to be the Winter Assize county for the Munster Circuit. This Order in Council has, by the provisions of the Winter Assize Act, the force of an Act of Parliament, and it is not competent to the Court to go behind that.

*Gerald Fitzgerald* for the prisoner.—The fact of there having been a previous abortive trial is no ground to change the venue: (*Reg. v. Magill*, 8 Ir. C. L. R. Ap. 62.) The fact of a view of the locality by the jury being required is sufficient to cause the venue to be laid in the county where the crime was committed: (*Reg. v. Fay*, Ir. L. 6 C. L. 436; *R. v. Tradgely*, 1 Sess. Cas. 180; *Anon 2*, Barnardison, 214.)

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*Our adv. vult.*

FITZGERALD, J.—A motion was made yesterday on the part of the defendant to make absolute a conditional order for a *certiorari* to remove the proceedings in the cause into this Court. The avowed object was to prevent a trial of the cause taking place in the city of Cork at the Winter Assizes for the Munster Circuit to commence on the 16th inst., and to retain the county of Clare as the place of trial. The facts as appearing on the affidavits were shortly as follows:—The defendant is accused of the murder of Patrick Kearney. The homicide took place on the 15th day of January, 1878, in the county of Clare. The defendant was put on his trial at the ensuing spring assizes, and the jury disagreed. The counsel for the prosecution thereupon intimated their willingness to postpone the case until the ensuing summer assizes, but the defendant resisted the postponement, and insisted on a second trial, which was accordingly to take place on the following day, but the prosecutors alleging that the attendance of jurors was insufficient, the presiding judge, on the application of the prosecutors, postponed the trial until the then next assizes. At the Clare Summer Assizes the defendant was again put on his trial, and the jury disagreed; and on the next day he was again put on his trial, and a jury having been empanelled, an order was made, on the application of the prosecutors, under the 11th sect. of the Jury Act (39 & 40 Vict. c. 78), that the jury should view and examine the place at which, and the vicinity in which the homicide took place. The view was had, and on the ensuing day the trial was proceeded with and ended again in a disagreement. The defendant states, but on information and belief, that on each of the trials a majority of the jury was for an acquittal, and that on the third trial the majority for his acquittal was eleven. The prisoner was remanded to custody, and the further trial of the cause was postponed to the Clare Spring Assizes, 1879, which in ordinary course will take place in the month of February next. It is now admitted on both sides that, if a fourth trial is to take place, a view is essential in order that the trial should be satisfactory. The case seems to be special and peculiar, and without adverting further to its facts, it may be taken as conceded that the jury who may try the case should have the aid of a view, not only of the particular spot in which it is alleged the homicide was committed, but also a view and examination of the neighbourhood for a considerable space; according to the affidavit of the Crown Solicitor, a distance of about two miles. The affidavit

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of the defendant states (paragraphs 8 and 9) : “ The impartiality and fairness of the jurors of Clare is not in the least impeached, and it is not alleged that there is in that county any feeling for, or sympathy with the defendant, or the crime, nor can it be pretended that the object of the defendant is to evade or delay his trial.” Notice has been given to the defendant that it is the intention of the prosecutors to put him on his trial for the fourth time at the county Winter Assizes, and before a jury of the city of Cork. Cork is a considerable distance, namely, about 100 miles from the locality of the homicide. The defendant resists the change of the place of trial, and insists on his common law and constitutional right to have his trial take place in the county of Clare, and before a jury of that county. It seems to me that the defendant’s contention is entitled to full and fair consideration, and I have no hesitation in stating my own individual opinion that, there being no impeachment whatever of the jurors of Clare, the case is one which might wisely have been left to be finally disposed of in the county of Clare. It may be well doubted whether such a case as that before us comes within the spirit of the Winter Assizes Act for the more speedy trial of prisoners where, within a period of six months after the offence, there have been three trials, and an abortive attempt at a fourth. The Judicature Act, 1877, extends the Winter Assize Act to Ireland, but we must not forget that the 38rd section of the same Act adopts definitely and wisely in civil causes the common law doctrine of locality in jury trials, when it directs “ that, so far as may be reasonably consistent with the convenient and speedy discharge of business, every issue and question of fact to be submitted to a jury shall be tried in the county or place where the cause of action shall have arisen.” The conditional order was obtained on several grounds, which for my part I decline to consider on a motion for a *certiorari*. I think that we ought to assume on this motion that the Winter Assize Order in Council is within the scope of the Winter Assize Act, and legal and valid; that the judge authorised by the Queen’s commission will have full jurisdiction and authority to make such order on the premises as may be necessary to effectuate the ends of justice, and that the jury to try the cause will be legally and properly selected and empanelled. If there is any substance in the points which I thus pass over, the defendant may raise them hereafter by plea to the jurisdiction or in some other solemn form. The point of defendant’s controversy, which he mainly rested on, is that a Cork jury either cannot have a view of the locality, or if they shall be sent to Clare there will be delay, difficulty, and damage in the journey to which a jury in a capital case ought not to be exposed. The practice at Criminal Law seems not to have recognised a view in cases of felony; but in lesser criminal trials a view was recognised, and if it was necessary in such cases for the satisfactory administration of criminal justice, and could not otherwise be obtained, a *certiorari* would go to effectuate it. The 11th section

of the last Jury Act gives power to the judge presiding in a Crown Court in his judicial discretion to direct a view in any case in which he may deem it expedient for the ends of justice. The defendant relies on this provision of the Act, and on the 23rd clause of the Order in Council for the Winter Assizes, which excludes from the Munster Winter Assizes "any indictment which has been, or before the holding of the said assizes shall be, removed into the Queen's Bench Division by *certiorari*," and he contends that he ought to have the case retained for trial in Clare, where an efficient view may be had and a satisfactory trial take place, and that a *certiorari* should go to effectuate that object. If there was no more in the case, in my judgment the writ ought to go to remove the cause from the cognizance of the Winter Assize judge at Cork. The Crown Solicitor by his affidavit made as cause against the order, states in paragraph four that it is intended to make application at the Winter Assizes for an order that the jury empanelled at Cork shall view the scene of murder. The defendant contends that the judge at the Winter Assizes will have no authority to make such an order, but I assume now that he has full jurisdiction and authority to do so. It will be a matter for the determination of the judge in the exercise of judicial discretion that I have no doubt will be wisely exercised. If the order shall be made, the prosecutors undertake to carry it into effect, but one shrinks from the contemplation of such a proceeding. The jury must be selected and empanelled before the order can be made and cannot be allowed to separate. It must be "a personally conducted tour;" that is to say, under the guidance of the sheriff, accompanied by a sufficient number of sworn bailiffs, and I can well imagine the necessary cloud of Royal Constabulary skirmishers at Mallow, Charleville, Limerick, Ennis, and Cruisheen, to keep off the outer world. The view at the last trial took the jury going from Ennis seven to nine hours of a summer day, and from Cork it must occupy at least two full days. The apprehension of such an expedition and its hardships will be sufficient to induce the best men on the Cork panel to evade, if they can, a duty so disagreeable and not free from peril to health in December weather. These and other topics have been strongly urged, but it seems to me they are matters not for us now, but fit to be addressed to the discretion of the judge at the Winter Assizes. My first impression at the close of the argument was that this Court ought to cut short all the legal and practical difficulties pointed out, by awarding the writ and remanding the cause to be tried in Clare, but on more mature consideration I have arrived at the opposite conclusion. The exercise of our superintending authority as to Courts of Criminal Jurisdiction ought to rest on a close and sharply defined foundation, and should not be exercised unless actually necessary for the full and satisfactory administration of justice. I apprehend that if we now ordered a *certiorari* in this exceptional case, the decision of the Court might, and probably

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would, be misconstrued and misunderstood, and might have to some extent a paralysing effect on the wholesome operation of the Winter Assizes Act. In refusing the writ we do not leave the defendant unprotected. We refer him to the discretion of the judge presiding at the assizes. If he shall make an order that a Cork jury shall be sent to view the locality, he will accompany it by such directions as may be best calculated to ensure its being made effectual. If, on the other hand, he refuses to make the order, it will follow, as of course, that the trial must be postponed to the next Clare assizes. I think that we exercise our discretion most wisely by allowing the cause shown on behalf of the Attorney-General, but well may I add the observation that "speedy trials may be attained at too great a cost."

MAY, C.J.—A writ of *certiorari* has been moved for in this case, the application being rested on the ground that it is necessary that the jury to try the prisoner should view the premises; and it is also suggested that a satisfactory trial cannot be had in the city of Cork where the Winter Assizes are to be held. Complaint has been made by counsel on behalf of the prisoner and in support of the application, that the constitutional right of the accused to be tried in the county where the offence was committed will in fact be abrogated. Further, it has been argued, that the county of Clare is not a neighbouring county to the city of Cork, and the validity of the Order in Council has been impeached on this and similar grounds. I may dispose of these latter points in the first instance. The Legislature has considered that the common law right of the prisoner to a local venue should give way in the case of a Winter Assizes to the general convenience, and has therefore provided by the Winter Assizes Act 1876 (extended to Ireland by the 63rd section of the Supreme Court of Judicature (Ireland) Act 1877) that it should be lawful for Her Majesty in England, or the Lord Lieutenant in Ireland, by Order in Council to provide for the uniting any neighbouring county or counties for the purpose of any Winter Assizes; and it is enacted that an Order in Council purporting to be made in pursuance of the Act of 1876 shall be deemed to be within the powers of the Act, and shall, while it is in force, have effect as if enacted by the statute. The Order in Council in the present case has united the county of Clare and other counties with the city of Cork, and has provided that the Winter Assizes for the consolidated county shall be held in the county of the city of Cork. The boundaries of the last-mentioned county for the purposes of the assizes are in fact enlarged to and embrace the whole of the united counties. The sheriff and the jurors of Cork are constituted sheriff and jurors for the entire area; a prisoner tried by jurors of the city of Cork must be deemed in point of law to be tried by a jury of the county of Clare. Such is the effect of the order, and upon this application the Court is bound to presume that it has the operation of an

Act of Parliament, and cannot, in my opinion, entertain any objection affecting the validity of the order. The only ground upon which the application for a *certiorari* in the present case can be rested is, that a view by the jury is necessary, and that such view cannot be had if the trial takes place in Cork. That it may be found inconvenient to send a jury from the city of Cork to view premises in the county of Clare is self evident, but it seems to me the argument of inconvenience is not properly addressed to this Court, as affording reason for awarding the writ of *certiorari*. It seems plain that the judge presiding at the Winter Assizes will have jurisdiction to order a view and to give all proper directions for carrying out such order. Should such an application be made to him, it is to be presumed he will exercise a sound judicial discretion upon the subject and decide whether a view is necessary, and if so whether the trial should proceed at the then assizes, the jury being sent in proper custody to inspect the premises, or whether, in order to avoid the difficulties attending the transmission of the jurors to and from the locality of the crime, the trial should be postponed till the Spring Assizes. Considerations of this kind are, in my opinion, proper for the presiding judge, and afford no reason for removing the indictment, thereby *pro tanto* paralysing the order in council. On the whole, I entirely concur in the judgment of Judge Fitzgerald and the reasons he has assigned for coming to the conclusion that the writ should not be granted.

O'BRIEN, J.—In this case I am of opinion that we should grant the writ of *certiorari* in order to postpone the trial till the next Spring Assizes for the county of Clare. Though the crime charged is that of murder, the circumstances of the case are not such as to cause any apprehension that the ends of justice would be frustrated, or the due administration of the law interfered with by granting the application. There have been already three trials of the case, and the prisoner has not shown any desire to postpone them for the purposes of delay. It is not even suggested by the Crown counsel that the present application is made for that purpose, or that a jury of the county of Clare would be more influenced by the fact of these three trials having been already had than the jury of any other county would be, and it was not alleged that, if this case was to be again tried in Clare, a fair and impartial trial would not be had in that county as well as elsewhere. The prisoner's counsel in support of his application relies upon the admission of the Crown counsel that wherever the case is to be tried again the jury should be sent to view the locality in which the murder is alleged to have been committed (as was done at the last trial in Clare), and, considering the great distance of that locality from Cork, I think that if the case was to be tried in Cork, there would be considerable difficulty in carrying out that arrangement so as not to interfere with the regularity and order of the proceedings. It is said, that though we should decline to grant the *certiorari*, it

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would still be in the power of the judge presiding at the Cork Assizes to postpone the trial till the assizes for Clare, and, in my opinion, that would under the circumstances of this case be the proper course for the judge to adopt if the case should be brought before him for trial. If that opinion be well-founded, I see no reason why we should now by refusing the *certiorari*, sanction proceedings that would terminate in such a result. The prisoner's counsel also contend that it is *primâ facie* the constitutional right of the prisoner to be tried in the county in which the offence alleged against him is alleged to have been committed. That right is interfered with by the statute of last year, which enables the Crown to have offences committed in one county tried in another, but it is in our power to preserve that right to the prisoner if we think that a trial in Clare would, under the circumstances, be more expedient for the ends of justice, and I see no reason why the Crown should insist on having the case tried in Cork, except, perhaps, for the purpose of asserting their legal right to do so. But as the *certiorari* should, in my opinion, be granted upon the ground of the great inexpediency of sending a jury from Cork to view the locality, we would not by granting it admit the validity of any of the objections relied on by prisoner's counsel as to the legality of the proceedings, or establish a precedent to be followed under different circumstances.

*Motion for certiorari refused.*

At the Winter Assizes for 1878, in the county of the city of Cork, Patrick McNamara was put on his trial for murder before Barry, J., and on the application of Gerald Fitzgerald, counsel for the prisoner, the trial was postponed till the Spring Assizes for Clare, 1879, on the ground of inconvenience arising from the necessity for a view of the *locus in quo* by the jury. Subsequently the Crown entered a *nolle prosequi*, and the prisoner was discharged.

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## HIGH COURT OF APPEAL.

Jan. 16, 23, and March 6, 1879.

(Before JAMES, BAGGALLAY, and BRAMWELL, L.JJ.)

*Ex parte BALL; Re SHEPHERD. (a)*

*Bankruptcy—Proof—Felony—Embezzlement by clerk—Omission to prosecute—Bankruptcy of injured person—Right of trustee to prove.*

A banker's clerk embezzled money belonging to the banker and absconded. The banker did not apply for a warrant for his apprehension until ten days after the discovery of the crime, and by that time the clerk had left England, and consequently was never prosecuted. The clerk was adjudicated a bankrupt in his absence, and the banker tendered a proof in the bankruptcy for the amount of which he had been defrauded. The proof was rejected by the trustee in the bankruptcy, and the banker having filed a liquidation petition, the trustee in the liquidation applied to the Court of Bankruptcy for an order that the proof should be admitted :

Held (affirming the decision of Bacon, C.J.), that the proof must be admitted ; James and Bramwell, L.JJ. so holding on the ground that, though the banker might not have been entitled to prove for a debt arising out of a felony in respect of which he had not prosecuted the felon (which *quære*), the obligation of prosecuting the felon was a personal one, and did not extend to the trustee in the banker's liquidation, who represented, not him, but his creditors ; and Baggallay, L.J. and Bacon, C.J. so holding on the ground that the rule which prevents an injured person from obtaining civil redress for a criminal wrong if he has failed in his duty of bringing the felon to justice, does not apply where prosecution has become impossible by reason of (amongst other things) the felon's escape from the jurisdiction before he could have been prosecuted by the exercise of reasonable diligence.

*Ex parte Elliott* (3 M. & Ayr. 110), and *Wellock v. Constantine* (2 H. & C. 146), considered.

(a) Reported by H. PRAT, Esq., Barrister-at-Law.

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THIS was an appeal from a decision of the Chief Judge in Bankruptcy, who admitted a proof in bankruptcy in respect of a felony committed by the bankrupt under the following circumstances:—

John Dawson Shepherd, who was a clerk in the employ of Henry Willis, Samuel Tomkins, and Samuel Leith Tomkins, partners, carrying on business as bankers under the firm of Messrs. Willis, Percival, and Co., of Lombard-street, absconded on the 16th day of March, 1877, and his employers then discovered that he had embezzled moneys belonging to them to the amount of a few hundred pounds, and on the 24th day of March they received a letter from him confessing that he had embezzled 7852*l.*

No application was made for a warrant for Shepherd's apprehension until the 26th day of March, 1877, by which time he had gone abroad, and consequently he was not arrested, and had not been prosecuted.

On the 4th day of May, 1877, Shepherd was adjudicated a bankrupt in the Greenwich County Court.

In May, 1878, Messrs. Willis, Percival, and Co. tendered a proof in the bankruptcy for the 7852*l.* which had been embezzled by the bankrupt, but the proof was rejected by the trustee, and his rejection was, in July, 1878, confirmed by the registrar of the Greenwich County Court, who held that Messrs. Willis, Percival, and Co. were not entitled to prove in the bankruptcy in respect of a felony committed by the bankrupt on the following grounds: That they did not take proper steps to prosecute the bankrupt; that instructions for the warrant were not issued from the 16th to the 26th March; and that it appeared from evidence, practically uncontradicted, given by Henry Roome, the brother-in-law, and Thomas Gueyer Shepherd, the brother of the bankrupt, that Mr. Samuel Tomkins (a member of the firm of Willis, Percival, and Co.) was wholly adverse to a prosecution, and that he was, in fact, desirous that the bankrupt should escape.

Before this decision was pronounced, Messrs. Willis, Percival, and Co. had filed a liquidation petition, and their creditors had resolved upon a liquidation, and appointed a trustee.

The trustee in the liquidation appealed from the registrar's decision to the Chief Judge in Bankruptcy, who ordered the proof for the 7852*l.* to be admitted on the ground that Messrs. Willis, Percival, and Co. had used due diligence in endeavouring to prosecute the bankrupt, and that the prosecution had become impossible without any fault of theirs.

The following is the evidence upon which the registrar of the County Court based his decision:

Henry Roome, the bankrupt's brother-in-law, was examined on behalf of the trustee in the bankruptcy, and deposed that he and Thomas Gueyer Shepherd, the bankrupt's brother, went on Saturday, the 17th day of March, 1877, to the bank and saw Mr. Samuel Tomkins, senior. They were told that there was 100*l.*

missing, and were desired to call again on Monday. They went again to the bank on Monday, the 19th day of March, and again saw Mr. Tomkins, senior, who after telling them that the matter was much more serious than they thought, suddenly asked witness, "Do you know where he is?" Witness said, "No," and Mr. Tomkins replied, "Ah! I do not wish to know," or words to that effect. Being further questioned, witness added, "The words, as near as I recollect, were: 'My advice is that he should go out of the country, to America, or elsewhere'—something to that effect." Witness further deposed that Mr. Tomkins, junior, then came in, holding in his hand a slip of paper, on which were written four figures, beginning, witness thought, with a 2, and said, "This is much more serious than we thought," or something to that effect, "I think we shall have to take legal proceedings," whereupon Mr. Tomkins, senior, remarked, "Never mind; that need make no difference to what I have already told you," addressing witness and the bankrupt's brother. On Thursday, the 22nd day of March, witness, with the bankrupt's wife and brother, again called at the bank and saw Mr. Tomkins, senior. Witness deposed that the bankrupt's wife said she would use her influence to bring her husband back to the bank as soon as she heard from him, and that Mr. Tomkins replied, "No, if he comes back here we might have to take legal proceedings against him."

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Thomas Gueyer Shepherd, the bankrupt's brother, confirmed the above evidence generally. His account of the conversation on Monday, the 19th day of March, was that Mr. Roome said to Mr. Tomkins, senior, "Would you wish to see John Shepherd?" and that Mr. Tomkins answered, "No, if he is not already out of the country, let him get away as quickly as possible." Mr. Tomkins further said that it was not John Shepherd that the bank wanted; they wanted the papers. As to the conversation on the 22nd day of March, witness deposed that "Mrs. Shepherd offered Mr. Tomkins, senior, for John Shepherd to come and throw himself on the mercy of the firm," whereupon Mr. Tomkins said, "No, if he did that we should be obliged to prosecute him, but of course we should not allow him to remain in England; if he were abroad I don't suppose we should trouble further for him."

Mr. Tomkins, senior, was examined, and denied any recollection of having used on Monday, the 19th day of March, the other expressions deposed to, but admitted that he said it was not John Shepherd he wanted; he wanted the papers. He admitted that he might have said that, if Shepherd were abroad, he did not suppose that the bank would trouble for him, supposing at that time that there was not a sufficient necessity to put the Extradition Treaty in force against him. As to the expression, "throwing himself on the mercy of the firm," witness deposed that what he said was to the effect that it was undesirable that John Shepherd should come and throw himself on the mercy



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of the bank, as it would place them in the painful dilemma of proceeding against a man who trusted to their generosity, or of letting a criminal escape.

Henry Roome further deposed that on Monday, the 19th day of March, after the conversation with Mr. Tomkins, he himself had an interview with John Shepherd, but that since that day he had not seen him, and did not know where he was.

BACON, C.J., when the appeal from the registrar's decision was opened before him, said:—The law cast upon the bankers the onus of endeavouring to bring the culprit to justice. I take the law to be plain enough. No doubt the obligation is thrown upon a man who is robbed to do his best to bring the person who has robbed him to justice, and if he uses all fair endeavours and fails, then he is not prevented from proceeding for any debt that is due to him in a civil court. The question is whether the claimant has neglected the duty which the law cast upon him. I think I had better hear the other side. [Having heard counsel in opposition to the claim to prove, his Lordship gave judgment as follows:] No doubt the case involves a principle of the utmost importance. The rule of law is clear and plain; it is the bounden duty of a man who is robbed—a duty he owes to the State—to use all reasonable endeavours to bring the offender to justice before he sues for a civil remedy. That being the general principle, the circumstances of the case before me must be examined. A confidential servant of the bank absents himself, and, suspicious being aroused, his accounts are examined, and it is found that 100*l.* is deficient. A further inquiry takes place, and after a protracted investigation it is found that his defalcations are much larger. But are not bankers to have a reasonable time in order that they may know what they are to do? One irregularity of 100*l.* is discovered, and suspicion exists as to the misappropriation of much larger sums, which they are wishing to trace. A conversation takes place between the bankrupt's relatives and the bankers, and what is the upshot of that conversation? Mr. Tomkins, sen., speaking for himself alone, and not as a member of the firm, when it was suggested that the clerk should throw himself upon the mercy of the firm, bethought himself that, if he consented, he might be deprived of the right to prosecute him; and I think it must be conceded that he said something of this kind: "I wish him to keep out of my sight, and go to America, rather than that I should have the pain of prosecuting him." But, beyond that slight conversation, what promise was made and what act was done by Mr. Tomkins to deprive him of his right to prosecute or suspend his civil rights until after he had prosecuted? It is in evidence that he did all that could be reasonably expected from him to bring the clerk to justice. Even if the conversation to which I have alluded had the effect of enabling the clerk to place himself out of the reach of his creditors, it would not, in my opinion, be sufficient to suspend or forfeit any civil

right on the part of the bankers. Mr. Tomkins takes out a warrant, which is put into the hands of persons especially conversant with these matters, and afterwards the warrant is put into the hands of an officer, who does all in his power to bring the offender to justice. If it were an improper or incautious suggestion that the clerk had better go to America, I do not think that it is sufficient to justify the conclusion that Mr. Tomkins did not do his best to bring the offender to justice. I am therefore of opinion that the objection to the proof does not rest upon sufficient grounds, and the appeal will be allowed. The appellant must have the costs of the appeal.

From this decision the trustee in the bankruptcy of Shepherd appealed.

*De Gex*, Q.C. and *F. H. Dickens* (with them *H. Winch*) for the appellant.—This proof ought not to be admitted. In *Ex parte Elliott, Re Jermyn* (3 M. & Ayr. 110), it was expressly laid down that no proof for any sums of money feloniously embezzled by the bankrupt can be admitted until the bankrupt shall have been criminally prosecuted for that offence. In *Stone v. Marsh (Fauntleroy's case)* (6 B. & C. 551, 565) this rule was recognised by Lord Tenterden, who said that it is a rule of the law of England that a man shall not be allowed to make a felony the foundation of a civil action against the felon, adding further on, "public policy requires that offenders against the laws shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender by receiving back stolen property, or any equivalent or composition for a felony, without suit, and, of course, cannot be allowed to maintain a suit for such a purpose;" but it was held that the rule was not applicable to a case like that of *Fauntleroy*, who had suffered the extreme sentence of the law for another offence of the same kind. In *Crosby v. Leng* (12 East, 409, 413) Lord Ellenborough said: "The policy of the law requires that, before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect of the public offence." [BRAMWELL, L.J. referred to Addison on Torts, p. 32, where it is stated that if the injured party has preferred a bill of indictment, which has been thrown out, or not proceeded with, by the suggestion of the judge, he has satisfied the requirements of the law in respect of the prosecution of the public offence, and is remitted to his civil remedy; and to the case of the *Dudley and West Bromwich Banking Company v. Spittle* (1 J. & H. 14; 2 L. T. Rep. N. S. 47), in which that rule was laid down by Wood, V.C.] It is now well settled that the debt is not merged in the felony, and that where a prosecution fails, the injured party can then prove: (*Ex parte Jones*, 2 M. & Ayr. 193; 3 D. & C. 525; *Ex parte Berks*, 2 M. & Ayr. 208.) No doubt was ever cast upon the rule for which we contend, and which has been recognised by

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very many judges, till the case of *Wells v. Abrahams* (26 L. T. Rep. N. S. 433; L. Rep. 7 Q. B. 554), in which Blackburn, J. used language which seems to imply a doubt as to the propriety of the rule, but the other judges in that case recognised the rule, and the decision was not at variance with it. In *Wellock v. Constantine* (2 H. & C. 146; 32 L. J. 285, Ex.), which was an action by a woman for assaulting her, and forcibly violating her person, whereby she was delivered of a child, the judge upon her evidence directed a nonsuit, and it was held by the court that the direction was right, for, if a rape had been committed, no action would lie until after the defendant had been prosecuted, and if the plaintiff had consented, she could not maintain an action for the assault. In that case, it is true, Martin, B. differed from the other judges, Pollock, C.B. and Bramwell, B. There may be an exception to the general rule when prosecution has become impossible by reason of the death of the offender, or otherwise, but the present case forms no such exception. Here, indeed, the evidence shows that the injured party desired the offender to escape from the country. [JAMES, L.J.—The appellant is the trustee in the liquidation of the injured party. The latter was under an obligation to prosecute the felon, and might perhaps have, by his omission to prosecute, been prevented from proving; but the trustee is under no such obligation, and what is there to prevent him from proving? The trustee can be in no better position than the liquidating debtor, whose rights vest in him. They also cited *Prosser v. Rowe* (2 C. & P. 421); *Markham v. Cobbe* (Noy. 82); Hale's Pleas of the Crown, 546; *Dawkes v. Coveleigh* (Sty. 346); *Higgins v. Butcher* (Yelv. 89); *Cooper v. Witham* (1 Levinz. 247); *Lutterell v. Reynell* (1 Mod. Rep. 282); *Gimson v. Woodful* (2 C. & P. 41); *Hayhes v. Smith* (Smith & Batty's Ir. Rep. 378); *Wickham v. Gatrill* (2 Sm. & G. 353); *White v. Spettigue* (13 M. & W. 603); *Owen v. Hurd* (2 T. R. 643).

*Winslow*, Q.C. and *Bush Cooper* for the respondent.

At the conclusion of the arguments on behalf of the appellant, their Lordships intimated that they would take time to consider the case, and would hear counsel for the respondent on a future day, if necessary. Ultimately, judgment was given without hearing counsel for the respondent.

*March 6.*—BRAMWELL, L.J. now delivered the following written judgment:—In this case the debt which is sought to be proved arose from the felonious act of the bankrupt in embezzling the moneys of his employers. The question is whether, that being so, and no more having been than has been done towards prosecuting the bankrupt, the trustee of Messrs. Willis and Co., the employers, can prove. The law on this subject is in a remarkable state. For 300 years it has been said in various ways by judges, many of the greatest eminence, without a doubt, except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that not so

much expressed by Blackburn, J., in *Wells v. Abrahams* (26 L. T. Rep. N. S. 433; L. Rep. 7 Q. B. 554) as to be inferred from what he said. But, though such opinion has been entertained and expressed for all this time, there are but two cases in which it has operated to prevent the debt being enforced. These two cases are *Wellock v. Constantine* (2 H. & C. 146) and *Ex parte Elliott* (3 Mont. & Ayr. 110). *Wellock v. Constantine* has been said to be no authority. If I may speak of myself, I have no doubt I concurred in the judgment, or the statement that I had would have been set right; but I am sure I must have done so in the faintest way, not only from what I think now, but from what I am reported to have said then, and from there being no reasons given for the judgment, which I should have desired to give, if I had thought there were any good ones to support it. But at all events there are the opinions of Chief Baron Pollock and Mr. Justice Willes—opinions which no one who knew those judges will undervalue. Then there is the judgment in *Ex parte Elliott*, besides the expressed opinion for centuries that a felonious origin of a debt is in some way an impediment to its enforcement. But in what way? I can think of only four possible:—(1) That no cause of action arises at all out of a felony; (2) that it does not arise till prosecution; (3) that it arises on the act, but is suspended till prosecution; (4) that there is neither defence to nor suspension of the claim by or at the instance of the felon debtor, but that the Court, of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these. That the first is not true is shown by *Stone v. Marsh* (6 B. & C. 551), where it was held that, prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of the felon *plus* a prosecution. The cause of action would not arise till after both. Till then the Statute of Limitations would not run. In such a case as the present, or where the felon had died, it would be impossible. And it is to be observed that it is never suggested that the cause of action is the debt and the prosecution. The third possible way is attended by difficulties. The suspension of a cause of action is a thing nearly unknown to the law. It exists where a negotiable instrument is given for a debt, and in cases of composition with creditors, and these were not held till after much doubt and contest. There may be other instances. And what is to happen? Is the Statute of Limitations to run? Suppose the debtor or his representative sue the creditor, is his set-off suspended? Then how is the defence of impediment to be set up? By plea? That would be contrary to the rule that *allegans suam turpitudinem non est audiendus*. Besides, it would be absurd to suppose that the debtor himself ever would so plead and face the consequences. Then is the fourth solution right? Nobody ever heard of such a thing;

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nobody in any case or book ever suggested it till Blackburn, J. did as a possibility. It is left to the Court to find it out on the pleadings. If it appears on the trial, is the judge to discharge the jury? How is the Crown to know of it? There are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action. But again, suppose it can be, what is the result? It has been held that where the felon is executed for another felony the claim may be maintained. What is to happen where he dies a natural death, where he goes beyond the jurisdiction, where there is a prosecution and an acquittal from collusion or carelessness by some prosecutor other than the party injured? All these cases create great difficulties in my mind in the application of this alleged law, and go a long way to justify Mr. Justice Blackburn's doubt. Still, after the continued expression of opinion in the cases of *Ex parte Elliott* and *Wellock v. Constantine*, I should hesitate to say that there is no practical law as alleged by the respondent. It is not necessary for us to do so in this case, because, assuming that there is, and assuming that Messrs. Willis and Co. themselves could maintain no claim in this case until they had performed their duty (if it can be said there is any) to prosecute, we are of opinion that there is no such duty in the respondent, who represents, not them, but their creditors; that the debt is due at and from the time of the act causing it; that the disability to sue or liability to have proceedings stayed, if any, is personal to him in whom is the duty, and, consequently, that this claim may be maintained. Whether that would be so if the assignment of the debt was purely voluntary and not under the Bankruptcy Act, I do not say. I may further add that I doubt much if Messrs. Willis and Co. themselves would not be entitled to prove, otherwise the estate of the bankrupt might be distributed and injustice done. If it should be said in answer to this that a claim could be entered, the complainant must be admitted to be heard, even before he can make a claim, and his claim would not prevent the distribution of the assets as they are got in amongst the creditors who have actually proved, unless some were set aside especially to provide for it, which would be a strange anomaly if the principle be a true one. In *Ex parte Elliott* neither proof nor claim was admitted.

JAMES, L.J.—The judgment which Bramwell, L.J. has just read expresses my opinion as well as his, though it does not express entirely that of Baggallay, L.J., whose judgment I will now read. His Lordship then read the following written judgment of

BAGGALLAY, L.J.:—I agree with my colleagues in thinking that the appeal in this case should be dismissed, but I prefer to rest my decision upon the same grounds as those assigned by the Chief Judge. It appears to me that the following propositions are affirmed by the authorities, many of which, however, are *dicta* or enunciations of principle rather than decisions:—(1)



That a felonious act may give rise to a maintainable action; (2) that the cause of action arises upon the commission of the offence; (3) that, notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing the felon to justice; (4) that this rule has no application to cases in which the offender has been brought to justice at the instance of some other person injured by a similar offence, as in *Fauntleroy's case* (*Stone v. Marsh*, 6 B. & C. 551), or in which prosecution is impossible by reason of the death of the offender, or of his escape from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence; (5) that the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect the seeking of civil redress by action. It is unnecessary to refer to the authorities by which these propositions have been affirmed; the whole subject is fully discussed, and the leading decisions commented upon in the cases of *Ex parte Elliott*, *Wellock v. Constantine*, and *Wells v. Abrahams*. I think, also, that the executors or administrators of the person injured by the felony, or his trustee in bankruptcy, can be in no better position than such person himself was at the date of his death or of the commencement of his bankruptcy; and if at such period prosecution of the offender had, by want of due diligence on his part, become impossible, and he had thereby been debarred from seeking civil redress, his estate must bear the consequences. The question then remains whether prosecution in the present case had been rendered impossible by reason of any want of due diligence on the part of Messrs. Willis and Co., and upon this point I agree with the Chief Judge in thinking that there was no default on their part sufficient to have deprived them of a right to prove, had they continued solvent.

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*The appeal accordingly dismissed with costs.*

*De Gez*, Q.C. asked for leave to appeal to the House of Lords.

*Winslow*, Q.C. opposed the application.

JAMES, L.J.—A grave question of principle is involved, and personally I should be very glad that the matter should be discussed in the House of Lords.

BRAMWELL, L.J. concurred.

Leave was accordingly given, on the terms of the petition of appeal being presented within a month.

JAMES, L.J.—I wish to say this, that if it were necessary to decide the point, I should require to hear a good deal more to satisfy me that Messrs. Willis and Co. used due diligence in endeavouring to prosecute the bankrupt.

BRAMWELL, L.J.—I desire to add this, that I am not sure that the law may not turn out to be this: that if the man goes abroad and so the prosecution becomes impossible, that is the mis-



*Ex parte* BALL; fortune of the creditor, and he must wait till he comes back  
*Re* SHEPHERD. again.

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Solicitors for the appellant, *Brook and Chapman.*  
 Solicitors for the respondent, *Lawrance, Plews, and Boyer.*

## HIGH COURT OF JUSTICE.

### COMMON PLEAS DIVISION.

*Nov. 25 and 26, 1878.*

(Before Lord COLERIDGE, C.J., GROVE and LINDLEY, JJ.)

BLAKE *v.* THE ALBION LIFE ASSURANCE SOCIETY. (*a*)

*Evidence—Remoteness—Connection between principal and evidentiary facts—System of fraud—Series of acts—Proof of agency.*

*In an action for the return of money paid by the plaintiff to the defendant through the fraud of the defendant's agent, evidence that by the same false pretences as in the particular case the defendant's agent had induced other persons to pay money to the defendant is admissible to prove either the agency or the fraud and defendant's knowledge of it.*

THIS was an action to recover a sum of 59*l.* 6*s.* 3*d.*, the amount paid by the plaintiff as a premium upon a policy effected with the defendants. The statement of claim alleged that in November, 1874, the plaintiff, a clergyman living in Norfolk, saw an advertisement in a newspaper inserted by one Henry Howard, an agent of the defendants, offering to lend money upon personal security. The plaintiff applied to Howard by letter, requesting a loan of 1500*l.*, and received the following reply :

11, Euston-square, London, N.W., 21st November, 1874.

Dear Sir,—I can entertain your application for an advance of 1500*l.* for three or fourteen years, at 4 per cent. interest per annum, payable half-yearly. The 1500*l.* to be repaid in one sum at the end of the term. You will have to insure your life in an insurance office, to be selected by me, for 1500*l.*, and deposit the policy as collateral security, the policy to be returned to you upon repayment of the money advanced, when you can either sell or keep for the benefit of your relatives. Let me know per return of post if this meets your views.—Yours truly,

H. HOWARD.

The plaintiff called at the office of Howard on two occasions,

(*a*) Reported by A. H. BITTLESTON, Esq., Barrister-at-Law.

but on neither did he see him, but only saw his manager, who, on the last occasion, agreed, on behalf and by the authority of Howard and the defendants, to lend the plaintiff, who agreed to borrow from Howard, 1500*l.* upon the condition that the plaintiff would insure his life in the defendants' office, and pay them a premium for such insurance, and would deposit the policy with the defendants as security for the repayment of such loan with interest, and the manager, on behalf of and for Howard and the defendants, agreed that no other security than the policy should be required from the plaintiff. The plaintiff accordingly applied to the defendant company to effect a policy of insurance on his life, which they accordingly did effect upon the payment by the plaintiff to the defendants of the sum of 59*l.* 6*s.* 3*d.* The plaintiff informed Howard that he had so insured his life, and forwarded to him the company's receipt for 59*l.* 6*s.* 3*d.* to show that he had done so, as agreed. Howard, instead of advancing the 1500*l.* as agreed, sent to the plaintiff the following letter :

11, Euston-square, 21st January, 1875.

Dear Sir,—By book-post you will receive draft securities, as prepared by my solicitor, for your perusal and approval, which please return to me at your earliest convenience, with any comments you may have to make indorsed thereon.—Yours truly,

H. HOWARD.

The draft securities mentioned in the letter were—(1) a bill of sale of furniture, (2) a guarantee of two sureties for the repayment of the loan, (3) an assignment of the policy, (4) a bond for the amount to be advanced, to be signed by the plaintiff, (5) a declaration as to debts to be made before a bench of magistrates sitting for the division of Norfolk. Upon the receipt of this letter, the plaintiff made several efforts to see Howard, but failed. The plaintiff was unable to procure the loan, or any part of it, notwithstanding his performance of, and readiness to perform, the agreed conditions, and the defendants and Howard had not and never intended to advance the loan. The arrangement between the defendants and Howard was that Howard should be the pretended lender of the money, and as if he had no connection with the said office. The defendants and Howard, by the contrivance appearing above, fraudulently induced the plaintiff to pay the 59*l.* 6*s.* 3*d.* upon the pretence that the sum of 1500*l.* should be advanced to him upon the terms agreed and hereinbefore set forth, whereas in fact they never intended that the sum should be advanced, and always intended without any notice to the plaintiff to demand securities which they knew he would not give or agree to. After the receipt of the 59*l.* 6*s.* 3*d.* by the defendants, the same was divided between the defendants and Howard. Howard, as the defendants well knew, was wholly unable, from his circumstances, to pay any sum of money recovered from him, and with the knowledge and contrivance of the defendants changed his name and address from time to time. The policy was effected by the plaintiff, and the premium paid only for the purpose of procuring the loan, and for no other purpose whatsoever, of

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which the defendants always had knowledge, and there never was any consideration whatever for the defendants retaining the 59*l.* 6*s.* 3*d.* The policy lapsed before this action. Every matter and act done by Howard or his manager were done for and on behalf, and with the sanction of, and were ratified by, the defendants, and Howard and his manager were in all things their agents to carry out the contrivance to procure them the premium of 59*l.* 6*s.* 3*d.*, there being no intention at any time, either by Howard or the defendants, that the loan of 1500*l.* should be advanced. The plaintiff claimed the 59*l.* 6*s.* 3*d.*, and also the expenses he had been put to in endeavouring to procure the advance to him of the 1500*l.* The plaintiff further prayed that the policy might be declared void, and cancelled on the ground of fraud, and that the premium was obtained by fraud.

By their statement of defence, the defendants denied the agency of Howard or his manager, their knowledge of the alleged fraud, or any connection whatever with him; and admitted only the making of the policy and payment of the premium, alleging that it was paid as the first year's premium on the policy, and no other premium was ever paid; that the year expired, and the policy was not kept up; that there was good consideration for the defendants retaining the premium, and the plaintiff had the benefit of the insurance until the policy lapsed. The plaintiff joined issue upon the statement of defence. The statement of claim had originally contained four paragraphs, which went to show that the transaction with the plaintiff was only one of several others of a similar kind by which other persons were defrauded into paying the defendants for effecting policies under the pretence of a loan by third persons who were, in fact, as the plaintiff alleged, agents acting in concert with the defendants for that purpose; but these paragraphs had been struck out by order of the court as irrelevant: (see *Blake v. The Albion Life Insurance Society*, 35 L. T. Rep. N. S. 269.) At the trial, before Lord Coleridge, C.J., the plaintiff proved the circumstances alleged in the statement of claim. Evidence was then tendered and admitted to show that this was a system of fraud, and that money had been obtained under similar circumstances from several other persons. This evidence showed that advertisements signed either Howard, Gard, Wood, Rogers, Preston, Seymour, Holland, or some other name, and often expressed in the identical words of the advertisement seen by the plaintiff, appeared offering an advance of money; that the witness placed himself in correspondence with the advertisers, insured his life in the office of the defendants, and paid them a premium, which they divided with the person who had offered the loan; that unreasonable requisitions for further securities were made, and the loan never advanced; that the policies were not renewed by the insurer; that they would not have been paid had they fallen in; that the names of the advertisers were all aliases of a man called Wood, who was constantly for hours

together, and, week after week for years had been, in close communication with the managing director and secretary, and sometimes other directors of the company; that cheques drawn in favour of Wood, Gard, or Rogers, or of the other different names, were all indorsed with the respective names in the handwriting of Wood. The jury found a verdict for the plaintiff for the sum claimed. A rule for a new trial having being granted on the ground of misreception of evidence,

*Willis, Q.C. and Tindal Atkinson* showed cause.—We were asking the jury to find that the acts of Howard were the acts of the company; and one instance was not sufficient to prove collusion between them. A jury, at the Central Criminal Court, has now found these defendants guilty of conspiracy to defraud, and, therefore, that this agreement between Howard and the defendants did exist. The two allegations in the statement of claim were—(1) that this was a company formed for the purpose of robbery, and (2) that the plaintiff had been robbed by it. The evidence in question was required to prove the first proposition. In cases of coining or receiving stolen goods, evidence of acts other than the one charged is admissible to show the fraudulent intent. They cited *Mackay v. The Commercial Bank of New Brunswick* (L. Rep. 5 P. C. 394); *Barwick v. English Joint Stock Bank* (L. Rep. 2 Ex. 259).

*M'Intyre, Q.C. and Patchett, Q.C.* in support of the rule.—There are *dicta* of Lord Coleridge, C.J. and Brett, L.J., in *Blake v. Albion Life Insurance Company* (35 L. T. Rep. N.S. 269), which are conclusive in this case. [GROVE, J.—Directly a link is found to connect the acts of fraud that it is proposed to prove with the fraudulent design charged, they become evidence. Lord COLERIDGE, C.J.—If we meant that evidence of fraudulent acts, unconnected with the fraud charged, was not admissible, that was right, but will not help you. If we meant that acts of fraud, connected with the particular fraud charged, could not be given in evidence, we were wrong. GROVE, J.—When the question is whether an act was or was not fraudulent, acts of a similar kind are given in evidence to show intention. I remember in a housebreaking case in which I was counsel, a man was found under suspicious circumstances in a bedroom; it was set up that he was there courting the servant; to show a guilty intention, Erle, C.J. admitted evidence of the fact that he was seen in the house a week before under circumstances equally suspicious and which rebutted the idea that he was there for the purpose of courting.] The evidence that similar frauds had been committed under similar circumstances was given in this case in order that the jury might find that the company were responsible for the frauds of Howard. But if it cannot be proved that Howard was the agent of the company on the particular occasion, then the plaintiff's case fails; he cannot show that Howard was agent for the company on various other occasions. *Primâ facie*, a company cannot appoint

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an agent to commit a fraud: (*Western Bank of Scotland v. Addie*, L. Rep. 1 S. & Div. App. 145.) That Howard was the agent of the directors, there can be no doubt. As between Northcote, Thomson (the managing director and secretary of the company), and the various agents, there was no doubt an agreement to defraud the public. But the company are not bound by fraudulent acts of the directors outside their authority. [Lord COLERIDGE, C.J. cited *Ranger v. Great Western Railway Company*, 5 H. of L. Cas. 72.] In *Western Bank of Scotland v. Addie* (*ubi sup.*), Lord Cranworth says: "An incorporate company cannot, in its corporate character, be called on to answer in an action for deceit. But if, by the fraud of its agents, third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by those frauds. If it is supposed that, in what I said when the case of *Ranger v. Great Western Railway Company* was decided in this House, I meant to give it as my opinion that the company could in that case have been made to answer as for a tort in an action for deceit, I can only say I had no such meaning. . . . An attentive consideration of the cases has convinced me that the true principle is, that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds, but that they cannot be sued as wrong-doers by imputing to them the misconduct of those whom they have employed." [LINDLEY, J.—That has been said in several cases. Lord COLERIDGE, C.J.—This is not an action for deceit; this is an action to recover back the money that has been paid as premium for the insurance, paid for the benefit of the company, and obtained by the fraud of its directors.] A *dictum* of Bramwell, L.J., in *Weir v. Bell* (L. Rep. 3 Ex. Div. 238), throws doubt upon the reasoning in the case of *Barwick v. English Joint Stock Bank* (*ubi sup.*), cited on the other side.

GROVE, J.—In this case I regret that I have to give judgment first, as the evidence is voluminous, and my Lord who tried the case would have been better able to state it. I rather expected that when the argument came to be heard two objections would have been taken to the admissibility of this evidence—one treating it as a totality, and the other splitting it up and objecting to particular parts. But there has been no argument on the latter alternative; and therefore all I have to consider is whether this evidence, taking it as a whole, is admissible. The action was brought by the plaintiff to recover back money paid to the defendant company, which it was alleged had been obtained from him by their agent fraudulently. The nature of the alleged fraud is this: The plaintiff says that he saw an advertisement of one Howard offering to lend money on personal security. He wrote to Howard, asking for a loan, and received a favourable answer, the only condition being, "You will have to insure your



life in an office to be selected by me." The plaintiff proposed to borrow 1500*l.* on these terms, insured his life with the defendants at the instance of Howard, and paid to them 59*l.* odd by way of premium. He did not, however, get the 1500*l.*, various other conditions being proposed to him which he refused. He could not get back the money which he had paid; he therefore only got a policy of insurance, which might or might not be worth anything. The plaintiff's case was that, under pretence of a promised loan, Howard was to induce persons to insure their lives in an office with which he was connected, and by this means was enabled to pocket their money without giving any consideration. In his statement of claim the plaintiff says that "the defendants and the said H. Howard, by the contrivance in this statement of claim mentioned, fraudulently induced the plaintiff to pay the 59*l.* 6*s.* 3*d.* upon the pretence that the sum of 1500*l.* should be advanced to him upon the terms agreed and hereinbefore set forth, whereas, in fact, they never intended that the sum should be advanced, and always intended, without any notice to the plaintiff, to demand securities which they knew he would not give or agree to;" and then he claims, not damages for the fraud, but, practically, a rescission of the contract. This is, therefore, an action for money had and received by the defendants without consideration, and obtained from the plaintiff by the fraud of the defendant company, or of its agents. Whether an action for deceit can or cannot be maintained against a company where a company has obtained money through the fraud of its agents, such money can undoubtedly be recovered back by the person from whom it has been so obtained. That is the case here; the money was clearly obtained from the plaintiff by fraud, and it went into the coffers of the defendant company. How is the plaintiff to prove the fraud? Here is a man, giving the name of Howard, which, as far as the transaction with the plaintiff goes, might be his real name, who, by requiring further securities than he originally stipulated for, virtually broke his undertaking to grant a loan, and received from the company, in return for introducing the insurer, 50 per cent. of the premium. These are all the elements of fraud in the transaction; and there is nothing on the face of them conclusive of fraud. Then other evidence was tendered to show that this was a fraud; that the policy was a sham policy; and that the loan was never intended to be made. The plaintiff says, I will show that there is no such person as Howard, and that exactly analogous transactions had been carried out with ten or a dozen other persons. The defendants contend that the plaintiff cannot show general transactions on the part of this company in this and other cases in which they have put forward a fictitious name, and obtained money on the faith of exactly similar promises of loans which they have never advanced to the persons to whom they promised them. I am of opinion that this evidence was admissible for the purpose of establishing fraud, which you can only prove by showing what was behind the

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ostensible transaction. The only way to prove that acts are fraudulent is to show the intent, the motive, the design, that is to be coupled with these acts. Therefore, were we to hold otherwise, and such evidence was not admissible, fraud could never be proved at all. To take the common instance of fraud committed by means of begging letters. If a single letter to one individual only were proved, the evidence would probably be insufficient for a conviction; but the particular transaction is shown to be a guilty one by proving that the person charged has done the same thing twenty times before, and that in each case he has told false stories, and given fictitious names. Then is there any rule of law to exclude this evidence? I am of opinion that there is not. Where the act itself does not *per se* show its nature, the law permits other acts to be given in evidence for the purpose of showing the nature of the particular act; as, for instance, in cases of uttering counterfeit coin; even in some cases of murder, and, generally, wherever it is necessary to show the intent with which an act was done. There is no difference between the rules of the civil and the criminal law in this respect; (a) if anything, the criminal law of evidence, which deals with cases where life and liberty are in dispute, is more strict than the civil. Therefore, supposing this action was brought against Howard, and it was doubtful whether his acts were fraudulent, you might give evidence of other acts to show that he did intend fraud. Now, that being so, can this evidence be given as regards a third person? Now I will assume that, if such third person had been charged with frauds similar to the particular act by Howard, but unconnected with it, they would not have been admissible. But cannot you give such evidence, when you identify these frauds with the person by whom the particular fraud was committed? Suppose Howard to be a fictitious name, and that the defendants perfectly well knew that these transactions were fraudulent, and that they were committed by Howard, and the defendants got the benefit of them; then it appears to me that this evidence is admissible. If you show similar shams, carried out under the same false name, and that the defendants are the people who put the money in their pocket in each case, the difficulty arising from any possibility of mistake in the case is removed, and the jury may reasonably be called upon to infer that the defendants intended to pocket the money of the plaintiff in the particular case. The instances that I have cited from the criminal law show that this evidence is admissible; and I know of no case the other way. Supposing Howard to be a fictitious person, then the evidence would be admissible in order to satisfy the jury that the defendants had used a fictitious name for the purpose of fraudulently getting money. To show that Howard was only one of ten fictitious names, was to show that

(a) *R. v. Burdett*, 4 B. & A. 95, 122, per Best, J.; *Attorney-General v. Le Merchant*, 2 T. R. 201, N.; *R. v. Murphy*, 8 C. & P. 297, 306; *Leach v. Simpson*, 5 M. & W. 809, 812, per Parke, B.; 25 How. St. Tr. 1314; 29 *Id.* 764.—[Note by Reporter.]

the use of that pseudonym was a fraudulent fiction, and not a mistake. How could that be shown except by the fact that they did transact business under various fictitious names? The very same man whom they called Howard, they called Gard and other names. I am at a loss to see how that evidence can be thought to be inadmissible. Every fraud must consist of a number of acts all calculated to further the fraudulent design. Is the plaintiff not entitled to show that the company entered in their books a series of fictitious names? Suppose that there was no person at all acting as agent of the company, and Howard, Gard, Wood, and the rest were names and nothing more; then the plaintiff would be entitled to show that the real persons he was dealing with were these directors, who put forward fictitious names in order to get letters into their own hands surreptitiously; he would be entitled to connect those fictitious names with the defendants, and to show that the insurance company, with whom the plaintiff insured, was connected with the name of the person who had advertised for persons wishing for loans. It would be a natural supposition of the plaintiff that Howard desired an insurance in a good solvent company, and that there was nothing novel in his making it a condition of the loan that the plaintiff should insure in a company to be named by him. I think that the plaintiff was entitled to show that the insurance company were really the principals, and had no agents. It is very doubtful whether an action for deceit will lie against a company. All that we have to decide, however, is that the plaintiff can bring this action, which is for the return of money paid without consideration, and that the benefit which the company derived from the frauds of their agent, if they had one, must be given up. It follows that the only evidence by which it could be shown that the money was obtained by fraud, and that the company benefited by it, was admissible.

LINDLEY, J.—I am of the same opinion, and after the exhaustive judgment of my brother Grove, I have very few words to add. The plaintiff's case is: I was induced by the fraud of Howard to pay certain money to you, the defendants, and, at the time I paid it, you knew it was obtained by the fraud of Howard. How is that case to be proved? We are asked to exclude all the evidence that was given as to the mode in which the defendant company carried on its business; in other words, all the evidence that throws light on this particular transaction. It is said by the plaintiff that this transaction of which he complains is only one of a class, and that a fraudulent class. Let it be shown that a fraud on A. is one of a class of similar frauds upon B., C., and D., and the frauds upon B., C., and D. at once become evidence in an action by A. It comes to this—is the plaintiff to be at liberty to show that this money was obtained from him by false pretences? He can only show that the pretence made to him was fraudulently false, by showing a series of similar pretences similarly falsified. If that evidence is to be

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excluded, it must be by some very strict rule that I do not know of. The true answer to such a suggestion is that the rule that excludes evidence of transactions other than the one that is being inquired into does not apply where the transaction that is the subject of the inquiry is one of a class. It does not appear to me to be necessary to decide the point as to the liability of companies for frauds of agents.

LORD COLERIDGE, C.J.—I am of the same opinion. Many questions have been raised in this case which I do not think it necessary to decide now. The simple question raised by this rule is whether certain evidence was properly received at the trial. Now it is obvious that in order to discover whether evidence is admissible at *Nisi Prius* the statement of claim has to be looked at. Objections might possibly have been taken to the statement of claim; but that question does not arise now. The general outline of the fraud alleged in the claim is this: A person called Howard offers by advertisement a loan of money, and the plaintiff answers the advertisement. Howard makes it one of the terms of the loan that the plaintiff shall insure his life in the defendant company's office. The negotiation is effected, and the premium is paid; outwardly there is no connection between the company and Howard. Afterwards exorbitant conditions are added to the terms on which the money was to be advanced, which conditions the plaintiff refuses, and no money is advanced. Obviously, so stated, there is nothing in the transaction which may not be *bonâ fide*. Suppose the office selected by Howard had been one of undoubted character, no jury, upon those facts alone, would find complicity between the office and Howard, and a verdict for the plaintiff. But, on inquiry, it was found from other cases that there was the most intimate connection between Howard and the defendants, and that the transaction between the plaintiff and Howard was quite well known to the defendants; offers of loans having been made for years under various names upon condition of insuring in the defendants' office, and upon the premium having been paid, the loan being in each case refused. It is not difficult to see that the obtaining of these premiums on policies of which there were no renewals, and upon which nothing was ever paid, was greatly to the benefit of the directors of this company. Such a state of facts, if proved, would show a gross and abominable fraud; but the proposition is that, though those facts would disclose a gross and abominable fraud, and though they could only be proved by giving in evidence the other cases that had been discovered, yet the rules of evidence prevent that being done. If that proposition were correct, many claims perfectly just and fair must fail by reason of it. There was a time when that would have been no argument against the correctness of the proposition; but that time has passed; and now the general rule is that almost everything that can throw light upon the matter is admitted. In any but an English court,

and to anyone but an English lawyer, the controversy whether this evidence is admissible or not would seem, I imagine, supremely ridiculous; because it is admitted that it is most cogent and material to the plaintiff's claim. Some legal ground having, however, to be shown for receiving it, I think it is receivable on two distinct legal grounds. Two things are necessary to be established here, agency and fraud. It was necessary to show that those who effected the contract were agents of the defendants, and that what was done was done with fraud. Now, except as to Howard, the agency was clear. The secretary, manager, and others, were manifestly agents to effect insurances for the company. It is therefore clear that the company would be responsible for acts done by them in the course of their duty. As regards Howard, this was not so manifest; and, therefore, this evidence was receivable to prove the agency of Howard. It would not be the less receivable on this ground because it would prejudice the defendants in another way. There is no such rule of evidence. This evidence does clearly go to prove Howard's agency. Evidence—in many cases conclusive evidence—was given that Howard and all these other names that were used were aliases of Wood; that Wood was in intimate connection with the company through its managing director and secretary; and that Wood received half of the premium paid to the company on an insurance being effected. Now it is clearly evidence of Howard's agency to show that this man who called himself Howard was Wood, that he was in intimate connection with these directors, and that they were repeatedly benefiting by his frauds; because the moment that you establish that all these names were aliases of one person, and that under those names this business was conducted for the benefit of the company, it seems to me that you establish also that that person was an agent of the company. This evidence is therefore receivable on that ground. But, secondly, you must also show that these acts were fraudulent. Supposing that this case had stood alone, there was certainly no conclusive evidence of fraud on the part of the company, but when it appears that the various names are aliases of one and the same agent, and that these repeated acts of getting money from persons who receive no corresponding benefit were known to the defendants, I think it is proved that the acts were fraudulent in their nature. Then the facts that the plaintiff had to establish, viz., that Howard was the agent of the defendants, that he had committed frauds, and that by those frauds the defendants had benefited, are made out. I think that this evidence does not fall within the rule, *Res inter alios acta alteri nocere non debet*, because the facts given here in evidence are necessary links in the chain of proof in the particular case. As to the previous decision of this court in the same case (35 L. T. Rep. N. S. 269), by which certain paragraphs were struck out from the claim, I think that does not conflict with our present decision, because they contained statements of *res inter*

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*alios actæ* without any attempt to connect them with the *res inter partes acta*. As to the observations of two of the judges in that case, it is not necessary to decide whether they can all be supported. They had reference only to the subject then before the court. I am of opinion, therefore, that this evidence was admissible, and that the rule should be discharged.

*Rule discharged.*

Solicitor for the plaintiff, *J. Robinson*.

Solicitors for the defendants, *Phelps, Bennett, and Woodforde*.

[Note by Reporter.—Where, in an action against A., to recover the value of work done by the plaintiff to certain houses on the order of B., the question was, whether A. or B. was liable as principal; evidence was held to be admissible to prove that A. had given orders to persons, other than the plaintiff, to do work at the same houses: (*Woodward v. Buchanan*, L. Rep. 5 Q. B. 285; 22 L. T. Rep. N. S. 123. See also *Reg. v. Francis*, L. Rep. 2 C. C. 128, 131; 30 L. T. Rep. N. S. 503.)]

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### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

*Wednesday, January 29, 1879.*

(Before MAY, C.J., O'BRIEN and FITZGERALD, JJ.)

*Re JOHN REA. (a) (b)*

*Committal by magistrate for contempt of court—Inadmissibility of evidence that statement in warrant of committal is untrue—Re Pollard (L. Rep. 2 P. C. C. 106) and Re John Rea (14 Cox C. C. 139) commented on and distinguished—14 & 15 Vict. c. 93, s. 9.*

*A solicitor who had been guilty of conduct amounting to a contempt of court was committed by magistrates, sitting at petty sessions, to gaol for a week. The warrant of committal stated that he had*

(a) Reported by *CECIL R. ROCHA, Esq., Barrister-at-Law.*

(b) NOTE.—In this case the offence committed was a distinct one from that adjudicated on in the case of *Re John Rea* (14 Cox C. C. 139).

*been offered an opportunity of showing cause why he should not be committed for contempt of court; but that instead of doing so he proceeded to interrupt the proceedings of the court.*

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*Held, that on habeas corpus affidavits could not be opened before the court to show that this statement on the warrant was untrue.*

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Warrant.

**I**N this case the prisoner, John Rea, a solicitor, in the course of a case, in which certain persons were charged with riot, tried at petty sessions in Belfast, was guilty of conduct amounting to a contempt of court, and was committed to gaol on a warrant stating that Mr. Rea, having intimated that he was for one of the accused only, persisted in interfering between the Court and the others; that he was guilty of a contempt of court, and that having been offered an opportunity of showing cause why he should not be committed for unlawful and wilful contempt of court, instead of showing such cause he again proceeded to interrupt the proceedings, whereupon he was committed to gaol for seven days. The prisoner was brought up on *habeas corpus*, and it was now proposed to open affidavits, filed on his behalf, to show that no such opportunity of showing cause, as stated in the warrant, was actually given.

*P. Keogh*, for the prisoner.—The proceedings which took place antecedent to the warrant were irregular. It should be open to the prisoner to show this by affidavit though the warrant itself be regular on its face: (*Re Pollard*, L. Rep. 2 P. C. C. 106.)

*Purcell*, Q.C., for the magistrates, *contra*.—If the law contended for by the prisoner be correct, there is not a single case of imprisonment throughout the country but might be questioned. The warrant being good on the face of it the court can inquire into it no further: (*Re The Sheriff of Middlesex*, 11 Ad. & El. 273; *Stockdale v. Hansard*, 9 Ad. & El. 1, and 11 Ad. & El. 253).

**MAY**, C.J.—The Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), by sect. 9 enacts, that if any person shall wilfully insult any justice or justices sitting in such petty sessions court, or shall commit any other contempt of any such court, it shall be lawful for any such justice or justices, by verbal order, to direct such person to be removed from such court, and taken into custody, and at any time before the rising of the court, by warrant, to commit any such person to gaol for any period not exceeding seven days, or to fine such person any sum not exceeding 40s. Mr. Rea was committed for contempt of court under that statute. A writ of *habeas corpus* has been obtained, and the legality of the committal is brought under consideration. It is plain that no tribunal could be maintained with order and decency unless the presiding judge had the power of dealing with and suppressing contempts committed in the Court. It is for the sake of the administration of justice, and in order to maintain the decency and order of judicial proceedings that this extensive and summary power is confided to a judge. The writ of *habeas corpus* was issued and directed to the governor of



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Belfast gaol, and the return made by that official shows that Mr. Rea was legally in custody. Counsel, however, on behalf of Mr. Rea, contend that, admitting that a contempt of Court was committed, as the warrant states, and that the warrant and return are regular, it is open for Mr. Rea to state by affidavit that previously to his committal no opportunity was given to him of showing cause against the intended order. For that purpose the case of *Re Pollard* (L. Rep. 2 P. C. C. 106) was cited, but upon referring to that case it will at once appear that it has little application to the motion before the Court. In that case the Chief Justice of Hongkong passed a sentence on a barrister practising in his court on account of alleged contemptuous language and conduct in the conduct of a case, the matter having occurred several days previously. The case came before the Privy Council upon an appeal from that sentence, the appellant stating in his affidavit that he had in vain applied to the judge to be informed in what his contempt consisted, and that he had stated in court that if he had conducted himself improperly, he was ready to apologise. The Privy Council, in reporting to Her Majesty, state that in their judgment, "No person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it be given to him;" and no doubt, as a general rule, that doctrine is a well founded and constitutional doctrine. But I am not aware that when an admitted contempt has been offered to a court in the face of the court, it is necessary for the presiding judge, before removing or committing the offender, to call on him to show cause why he should not be committed or removed and it would appear clear that the section of the Act above referred to contemplated no such formality. It is to be also observed that we are not dealing with the case of *certiorari* seeking to quash the order of the magistrate, in which case the propriety of the order might be inquired into as in *Ex parte Porter* (5 B. & S. 299). The prisoner is before us on *habeas corpus*, and on such a case I do not think the court should go into such questions as are sought to be raised. It is admitted that a contempt was committed, that the warrant of committal is regular and valid on the face of it, and under such circumstances I think that the court can only order the prisoner to be remanded.

O'BRIEN, J.—When in the matter of *John Rea* (14 Cox C. C. 139) was before me last October, in *Re Pollard* (L. Rep. 2 P. C. C. 106), was strongly relied on as now, it being declared by the Privy Council in their judgment that no person should be punished for contempt, which was a criminal offence, unless the specific offence charged against him was distinctly stated, and an opportunity of answering it given. The affidavits were fully before me last October, and they did not in my opinion satisfactorily establish that such opportunity was on that occasion given to Mr. Rea, and as it appeared that Mr. Rea would be in

any event entitled to discharge on the following day, I gave him the benefit of the doubt, and directed his discharge. Now, however, I look upon it as decided by the judgment of the Court in the present case, that the principle of in *Re Pollard* does not apply to a case like this; and whatever my opinion might be, this decision must now be considered as the law of the land, and it is certainly desirable that there should be some settled law on the subject. I may intimate, however, that I am inclined to say Mr. Keogh might be allowed to open the affidavits.

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FITZGERALD, J.—I concur in the judgment delivered by my Lord Chief Justice, and do not think that his decision in the slightest degree trenches upon *Re Pollard* (L. Rep. 2 P. C. C. 106). The contention of Mr. Keogh appears to be that after the magistrate, in the exercise of the summary power conferred on him by the statute, had decided that Mr. Rea was guilty of contempt, he (Mr. Rea) should then, though all this occurred in his presence and in open court, get a formal notification to show cause and until that had been done the magistrate could not have passed sentence. In my opinion, if it appeared plainly on the warrant that all the proceedings took place in the presence and hearing of Mr. Rea himself, it was unnecessary that there should be such an averment as that in the warrant. I may observe, too, that the statute points out how this statutable authority was to be exercised and says not one word of any requisition to the defendant to show cause. I do not for a moment deny that the warrant itself is not conclusive. It has always been held here that, either on *habeas corpus* or on motion for a *certiorari*, there is liberty to show that the Court below had no jurisdiction and that the mere assertion of jurisdiction by the Court below does not prove it. But the argument in the present case, that the defendant should have been called on to show cause, does not affect the question of jurisdiction; on the contrary, it admits the magistrate's jurisdiction and rests upon this, that in the exercise of it there had been irregularity. I am clearly of opinion that it is not a matter we ought to investigate on a motion of this kind.

*Prisoner remanded to custody.*

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### HIGH COURT OF JUSTICE.

#### EXCHEQUER DIVISION.

(Before PALLAS, C.B., FITZGERALD and DOWSE, B.B.)

*Wednesday, Feb. 12, 1879.*

LEFROY v. BURNSIDE. (a)

*Libel—Right to interrogate proprietor of a newspaper under 6 & 7 Will. 4, c. 76, sect. 19, in a civil action when a criminal prosecution is pending—Judicature Act (Ireland), 1877—40 & 41 Vict. c. 57, sect. 27, sub-sect. 7—Judicature Act (England), 1873, sect. 24, sub-sect. 7.*

*In an action for libel in a civil court, when a criminal prosecution is pending the plaintiff has a right, under the joint provisions of 6 & 7 Will. 4, c. 76, sect. 19, and 40 & 41 Vict. c. 57, sect. 27, sub-sect. 7 (Judicature Act, England, 1873, sect. 24, sub-sect. 7) to obtain discovery from the proprietor of a newspaper to be enforced by interrogatories.*

**A**CTION for libel for certain newspaper articles which appeared in *Saunders' Irish Daily News*, of which it was alleged the defendant was proprietor. The article complained of imputed to the plaintiff improper conduct in obtaining and publishing certain documents in another newspaper, and was set out in the sixth paragraph of the statement of claim. A criminal prosecution had also been instituted against the defendant in respect of the same libel. The plaintiff now moved to compel the defendant to answer the following interrogatories :

First, Is it not a fact that in the said newspaper (the *Saunders' Irish Daily News*), published on the said 6th day of July, 1878, or some other, and what date an article appeared in the words and figures set forth in the sixth paragraph of the statement of claim in this action? If not how otherwise?

Secondly, Were not you the defendant, William Burnside, upon

(a) Reported by OGCIL R. ROOME, Esq., Barrister-at-Law.

and before the said 6th day of July, 1878, or some other and what date, the proprietor either alone or jointly with some other and what person or persons of the said newspaper?

The answer of the defendant to the said interrogatories was as follows: "I say that the plaintiff Edward Thomas Lefroy, at the assizes of oyer and terminer for the county of the city of Dublin, held at Green-street, in the said county of the city, in August last, preferred a bill of indictment against me and one William A. Murray, for having printed and published an alleged malicious and defamatory libel in the said *Saunders' Irish Daily News* and which said bill of indictment was found at the said assizes and was afterwards, on my application, removed by writ of *certiorari* into the Queen's Bench Division. And I further say that each of the said interrogatories tends to criminate me, and that my answer to either of said interrogatories would tend to criminate me, and for the reasons aforesaid I respectfully decline to answer either of said interrogatories; and I humbly submit to the Court that I am not bound to make any further or other answers to either of said interrogatories."

Sect. 19 of 6 & 7 Will. 4 enacts that discovery of the proprietor, printer, or publisher of any newspaper may be enforced by a party in an action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person and the same section provides that any discovery so obtained shall not be made use of as evidence in any other proceeding against the defendants.

*McLaughlin*, Q.C., with him *Houston*, for the plaintiff.—The 32 & 33 Vict. c. 24, sect. 1, repeals in part the 6 & 7 Will. 4, c. 74, but re-enacts the 19th section. The 33 & 34 Vict. c. 99, without referring to the 32 & 33 Vict. c. 24, repealed the original Act so far as not already repealed, and left the law as it was previously under sect. 19 of 6 & 7 Will. 4, c. 76. See *Dixon v. Enoch* (L. Rep. 13 Eq. 394); *Ramsden v. Briarley* (W. N., 1875, 199.)

*Porter*, Q.C., with him *Molloy*, for the defendant, relied on the fact of the criminal proceedings being pending as an excuse for declining to answer the interrogatories. They cited: (*Fisher v. Owen*, 8 Ch. Div. 645; *Allhusen v. Labouchere*, 3 Q. B. Div. 654; *Tapling v. Ward*, 6 H. & N. 749.)

PALLES, C.B.—It is admitted that at the time of the coming into operation of our Judicature Act, the provisions of the 6 & 7 Will. 4, c. 76, s. 19, were in force as a substantive enactment of the 32 & 33 Vict. c. 24. At that time, therefore, a person alleging himself to have been libelled in a newspaper was entitled to appeal to the oath of the alleged proprietor upon the question whether he was in fact such proprietor. The mode and form in which this appeal to the oath of the alleged proprietor could be made was under the 6 & 7 Will. 4, c. 76, by filing a bill for discovery. It is unnecessary to consider whether, after the passing of our Common Law Procedure Act of 1856, the form

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of applying to the Court for liberty to exhibit interrogatories might not also have been adopted. But whether it could or not, the substance of the right was the appeal to the oath of the alleged proprietor, the mode of asserting that right, whether it was by bill of discovery in equity or by interrogatories at common law, was matter of form and procedure only. Then came the Judicature Act and in my opinion the effect of that Act upon a question like the present was to leave unaffected the right, but to alter the form and procedure by which that right might be enforced. The plaintiff therefore continues to be entitled to appeal to the oath of the alleged proprietor as to his proprietorship; but that right he cannot enforce by a bill of discovery, for such a proceeding has been abolished, nor need he enforce it by an action for discovery alone. Sect. 27, sub-sect. 7, of the Act provides that "The High Court of Justice shall in every cause or pending, have power to grant, and shall grant, all such remedies whatsoever as any of the parties thereto may appear to be entitled to, in respect of any and every legal and equitable claim, so that as far as possible all matters so in controversy between the parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any such matter avoided." The latter words in my mind clearly indicate that an action for discovery alone need not, and indeed ought not, to be instituted in aid of another pending action between the same parties; but that such discovery as a party in any action was theretofore entitled to from any other party should be obtained by a proceeding in such one action. It is unnecessary to refer to the rules of Court to show the mode in which effect has been given to this intention. In my opinion the plaintiff's right to this discovery is a subsisting right, and is capable of being enforced and ought to be enforced in this action.

FITZGERALD and DOWSE, B.B., concurred.

## HIGH COURT OF JUSTICE.

## COMMON PLEAS DIVISION.

*Dec. 7, 1878, and Jan. 11, 1879.*

(Before DENMAN, J.)

NIGOTTI v. COLVILLE. (a)

*False imprisonment—Time, mode of computation—Calendar month  
—Expiration of term of imprisonment.*

*The plaintiff, who had been sentenced by a police magistrate on the 31st day of October to two different terms of imprisonment on two convictions, the first for "one calendar month," the second "for fourteen days, to commence at the expiration of the imprisonment previously adjudged," sued the defendant, the governor of Coldbath Fields Prison, for false imprisonment. The plaintiff was received into the defendant's custody on the 31st day of October, and finally released on the 14th December at 9 a.m.*

*Held, that the facts disclosed no cause of action, the term of imprisonment not strictly expiring until midnight on the 14th day of December.*

*"One calendar month," in a sentence of imprisonment, means a period expiring on that day in the succeeding month which corresponds numerically with the day on which the sentence is pronounced.*

## FURTHER CONSIDERATION.

The plaintiff, who sued the governor of Coldbath Fields Prison for false imprisonment, had been sentenced on the 31st day of October to two successive terms of imprisonment, one calendar month and fourteen days respectively.

The defendant received the plaintiff into his custody on the afternoon of the same day, and finally discharged him at 9 a.m. on the 14th day of December.

The jury having provisionally assessed the damages at 20s., the case was adjourned for further argument.

*Kydd and Barnard*, for the plaintiff, argued that the first period of one calendar month's imprisonment must be regarded as having commenced at midnight on the 30th day of October, the plaintiff having been in custody during part of the 31st, and a part of

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.



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a day being in law equivalent to a whole day for such a purpose. This being so, the month would expire at midnight on the 29th day of November, that completing thirty entire days. If the term were reckoned to midnight on the 30th November, the plaintiff would have been detained in prison during the whole of November (which would be one calendar month), and, in addition, one day in October, under a sentence of one month. Fourteen days from midnight on the 29th day of November would expire at midnight on the 13th day of December, so that there was an illegal detention.

*A. L. Smith*, for the defendant, contended that the first sentence of one calendar month did not expire until midnight on the 30th day of November at the earliest. *Cur. adv. vult.*

DENMAN, J., subsequently delivered the following written judgment.—This was an action for false imprisonment by detaining the plaintiff in custody for a longer period than, as he contended, he was liable to be detained. The facts were not in dispute. I took the opinion of the jury as to the damages, which were assessed at 20s. After hearing counsel, I took time to consider whether judgment ought to be for the plaintiff or for the defendant. The plaintiff had been convicted by a metropolitan police magistrate of two different assaults, and sentenced to imprisonment upon each conviction. The convictions took place at eleven a.m. on the 31st day of October, and the commitments, were drawn up in accordance with the sentences passed. For the first assault the plaintiff was sentenced to be imprisoned “for one calendar month;” and, for the second assault, “for fourteen days, to commence at the expiration of the imprisonment previously adjudged.” He was taken into the custody of the defendant, being the governor of Coldbath Fields Prison, during the afternoon of the 31st day of October, and finally released at nine a.m. on the 14th day of December, having claimed to be released on the previous day. It was contended for the plaintiff that the calendar month (the term of the first sentence) commenced at midnight on the 30th day of October. So far, I am of opinion that the plaintiff’s contention was well founded. I can find no express authority on the point, but, arguing from analogous cases, I think I ought so to hold. It has been held in many cases that, as a general rule, except where it is necessary in order to settle which of two actions on the same day is to prevail, the law takes no notice of parts of a day, and that the first day to be counted is the day, any part of which is occupied in the particular business which is to endure for a certain number of days in order to fulfil any requirement of the law. This principle is recognised in the often-cited case of *Combe v. Pitt* (3 Burr. 1434), in *Field v. Jones* (9 East. 154), in *Glassington v. Rawlings* (3 East. 407), where it was held that, under the statute which enacted that a trader lying in prison two months after an arrest for debt should be adjudged a

bankrupt, the day of arrest was to be included in the computation of the two months; and also in *Wright v. Mills* (4 H & N. 488) and other cases; and this is stated to be the rule applicable "to all judicial acts" in the judgment of the Exchequer Chamber in *Edwards v. The Queen* (9 Exch. 628.) There are no doubt several cases in which, where the date is to run from an act done, it has been held that the day on which the act is done is to be excluded from the computation. See *Lester v. Garland* (15 Ves. jun. 254.) There are also cases in which, where a payment is to be made or something to be done "within so many days or months," or "at the expiration of so many days or months," the day of the event within or at the expiration of so many days from which the payment is to be made, or the act done, is not included in the reckoning. The case of a bill of exchange is a familiar instance. But I can find no authority for saying that the general rule ought not to apply to a case of a sentence of imprisonment. Nor can I see any ground for doubting that it applies to the case, where the sentence is for a calendar month, or a given number of calendar months, just as much as to a sentence for so many days. Holding, then, that the first sentence in the present case must be computed from midnight on the 30th day of October, when did the calendar month expire? The plaintiff contends that it expired at midnight on the 29th day of November at the latest; and he does so on the ground that, if not, the plaintiff under a sentence of one calendar month's imprisonment would have to undergo something more than a calendar month's imprisonment, inasmuch as he would be imprisoned for the whole of one day in October (*i.e.*, from midnight on the 30th to midnight on the 31st day of October), *plus* twenty-nine days and something more (nay, even a whole calendar month more) in November, making in the whole more than thirty days; whereas November, which is a calendar month, only consists of thirty days. Therefore, it is argued, it follows of necessity that he will have suffered more than a calendar month's imprisonment, and in this particular case he will have actually been imprisoned during the whole calendar month of November, *plus* one day in October. It appears to me that his argument, however plausible, is not sound. The question appears to me to depend entirely upon what was the meaning of "one calendar month" at the time the sentence was passed; and I am of opinion that at that time, *viz.*, on the 31st day of October, those words meant a month, ending on the day in the succeeding month corresponding to the day of the sentence, according to the ordinary understanding of the words "this day calendar month." The whole difficulty of the case here arises from the fact of October having thirty-one days, and November only thirty; but I think that a few considerations will show how that difficulty ought to be solved. Suppose instead of the 31st day of October this sentence had been passed on the 26th. Then, applying the rule mentioned above as to the commencement of the term, the prisoner would be entitled to count the whole of the 26th as a day

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of imprisonment, *i.e.*, the sentence would have begun to run from midnight on the 25th. I apprehend that no one would contend that it would have expired before midnight on the 25th day of November. Why? because that would be the expiration of the "calendar month." Yet in that case, as in this, the calendar month spent in prison would have been one of thirty-one days and not of thirty days. This seems to show that the meaning of "one calendar month" cannot be construed with reference only to the duration of the latter of the two months over which it may extend. If it did, then a sentence of one calendar month passed on the 29th day of January would expire not on the 28th day of February, but at midnight on the 25th, because, February being a calendar month of twenty-eight days, the prisoner would have in that sense spent a calendar month in prison. In the case of bills of exchange, in which the word month is held to mean "calendar month," it is laid down by all the text writers that bills of one month drawn on the 28th, 29th, 30th, or 31st days of January will fall due (excluding the days of grace) all on the same day, *viz.*, 28th day of February, or in Leap Year on the 29th. See Byles on Bills, 12th edit., p. 206; Chitty on Bills, 11th edit., by J. A. Russell, p. 264 (and the older books there cited in the note); Story on Bills, 1st edit., s. 335, note 1. Yet those drawn on the 28th and 29th would, according to the mode of reckoning here contended for by the plaintiff have been running one or two days more than the whole of February, and therefore more than a calendar month. It is no doubt true that the law applicable to bills of exchange depends upon the usage of merchants, and is not necessarily applicable to other cases; but where the question is, what is the true meaning of so familiar an expression as "one calendar month," it is useful to consider how such an expression is regarded in any case in which it is constantly used in familiar legal instruments. On the whole I am of opinion that a sentence of imprisonment for one calendar month passed on any given day of any given month, is held to begin to run from the first moment of that day, and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month not having so many days as the preceding month, then, by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its last day; but as long as there is a day in the calendar numerically corresponding with the day from which the sentence begins to run, so that it is unnecessary to trench upon a succeeding month, I see no ground for anticipating the expiration of the sentence. This being so, it follows that the plaintiff was not strictly entitled to his discharge until midnight on the 14th day of December, being one calendar month and fourteen days from the time from which his first sentence began to run, and fourteen days from its expiration. I am of opinion, for these reasons,

that the plaintiff, who was discharged at nine o'clock in the morning of the 14th day of December, was not detained illegally, and I accordingly give judgment for the defendant with costs.

*Judgment for the defendant.*

Solicitors for the plaintiff, *Gold and Son.*

Solicitors for the defendant, *Nicholson and Herbert.*

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## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

*Feb. 18, 19, 20, and March 28.*

(Present: The Right Hons. Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT COLLIER.)

### THE BANK OF NEW SOUTH WALES v. OWSTON. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*Malicious prosecution—Authority of bank manager—Evidence—Misdirection — Practice — Appealable amount — Interest on judgment.*

*An authority in an agent to arrest offenders, and to institute criminal proceedings, can only be implied where the duties which he has to perform cannot be efficiently discharged for the benefit of his employer unless he has power promptly to apprehend offenders on the spot.*

*W., the acting manager of the appellants, commenced criminal proceedings against the respondent, a merchant at Sydney, on a charge of stealing a bill of exchange, which proved to be groundless. In an action for malicious prosecution brought by the respondent against the bank.*

*Held (reversing the judgment of the Court below), that such proceedings not being in the ordinary routine of banking business, and the evidence not showing any case of emergency, the judge misdirected the jury in telling them that such authority was to be inferred from W.'s position alone; and in the absence of direct evidence of such authority, the bank was not liable.*

*When interest on the amount of a verdict is given, and included in*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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*the judgment, such interest must be taken into account in considering whether the amount at issue reaches the limit allowed for an appeal.*

THIS was an appeal from a judgment of the Supreme Court of New South Wales (Hargreave and Manning, JJ., Martin, C.J., dissenting), discharging a rule *nisi* to set aside a verdict for the respondent for 500*l.* and costs, and to enter a non-suit, or for a new trial, in an action brought by him against the appellants, the New South Wales Bank, for malicious prosecution under circumstances which appear fully in the judgment of their Lordships.

*Benjamin*, Q.C., and *Arbuthnot* (*J. C. Mathew* with them) appeared for the appellants.

*J. D. Wood* (*McIntyre*, Q.C., with him) for the respondent, took the preliminary objection that by the Order in Council of the 13th day of November, 1850, the Supreme Court of New South Wales had no power to grant leave to appeal, except in cases in which judgement had been given in respect of any sum or matter at issue above the amount or value of 500*l.*, without obtaining special leave from the Privy Council, which had not been done in this case.

On this point their LORDSHIPS gave judgment as follows:—In this case an objection has been made to the leave granted by the Supreme Court of New South Wales to appeal to Her Majesty on the ground that the sum involved is below the appealable amount. By the Order in Council of the 13th day of November, 1850, which regulates appeals from the Supreme Court of New South Wales, an appeal is given from any final judgment, decree, order, or sentence of the Supreme Court, subject to certain regulations and limitations, the first being that such judgment, decree, order, or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of 500*l.* sterling. In the present case the action was for malicious prosecution, and the damages were laid at 5000*l.* On the trial the jury found a verdict for the plaintiff, with 500*l.* damages. A rule *nisi* was applied for to set aside that verdict, which was granted, but upon argument discharged by the Court. The rule was discharged on the 12th day of March, 1877, and on the 13th judgment was entered. The judgment so signed was as follows: “Judgment after verdict for the plaintiff, damages 500*l.*; interest on the above amount, from the date of verdict, the 15th day of May, 1876, to date, 33*l.* 1*s.* 11*d.*; taxed costs, 317*l.* 12*s.* 10*d.*” It is plain from previous decisions of this tribunal that the costs may not be added to the amount recovered in estimating the appealable sum; and it is now contended at the bar that interest on the sum awarded by the verdict ought not to be added. Their Lordships, however, think that interest under the laws existing in New South Wales is to be considered in estimating the amount. Interest on a verdict is given by the



statute (24 Vict. No. 8), the first section of which enacts that—  
 “Every plaintiff who shall hereafter obtain a verdict in an action in the Supreme Court, upon which he shall hereafter obtain judgment, shall be entitled to interest at the rate of 8l. per cent. per annum on the amount of such verdict from the time of obtaining such verdict until the time of entering up judgment thereon, and the amount of such interest shall be included in the judgment.” The interest therefore is payable upon the amount of the verdict from the time of obtaining it until the time of entering up the judgment. It is to be included in the judgment, and forms part of it. What, then, is the sum “in issue,” to use the words of the statute, in the present appeal? The verdict is only a step towards the judgment. The sum cannot be recovered upon the verdict, but is recovered in execution upon the judgment. The foundation of the judgment is the verdict, and the rule that was obtained to set aside that verdict must be understood as involving the whole sum which the verdict would carry, and which would be included in the judgment. That sum is not the original sum only, but, by virtue of the statute, that sum and interest. A similar question was before this tribunal in certain appeals from India (*Goorooper-sad Khoond v. Juggutchunder*, 8 Moo. Ind. Ap. 166.) The part which is material is at page 168: “Where the appeal is from the whole decree, and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs. 10,000, it is clear that the matter which is in dispute in the appeal, must exceed the sum of Rs. 10,000; for the question to be tried upon the appeal must be whether the decree is or is not right; that is to say, whether the decree has or has not properly ordered payment of a sum exceeding Rs. 10,000. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the Sudder Court is an amount exceeding Rs. 10,000, there, in their Lordships’ judgment, the case clearly falls within the terms of the Order in Council.” In the same judgment their Lordships state that they “must not, of course, be understood to intimate that the Sudder Courts ought to give leave to appeal in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree.” Here their Lordships think that the sum involved in the judgment appealed from does exceed, for the reasons they have stated, the sum of 500l., and we are therefore of opinion that the appeal ought to proceed.

The appeal was then heard upon the merits.

For the appellants it was contended that the verdict was against the weight of the evidence, there being no evidence that the prosecution had been directed by the bank. It cannot be contended that it is within the general authority of the manager of a bank to institute a criminal prosecution, and there was no evidence of implied authority, or any ratification of his act. The learned judge misdirected the jury. The following cases were cited:

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*Mackay v. The Chartered Bank of New Brunswick* (30 L. T. Rep. N. S. 180; L. Rep. 5 P. C. 394); *Eastern Counties Railway Company v. Broom* (6 Ex. 314; 20 L. J. 196, Ex.); *Roe v. The Birkenhead, &c. Railway Company* (7 Ex. 36); *Goff v. Great Northern Railway Company* (3 L. T. Rep. N. S. 850; 3 E. & E. 672); *Poulton v. London and South-Western Railway Company* (17 L. T. Rep. N. S. 11; L. Rep. 2 Q. B. 534); *Walker v. South-Eastern Railway Company* (23 L. T. Rep. N. S. 14; L. Rep. 5 C. P. 640); *Edwards v. London and North-Western Railway Company* (22 L. T. Rep. N. S. 656; L. Rep. 5 C. P. 445); *Allen v. London and South-Western Railway Company* (23 L. T. Rep. N. S. 612; L. Rep. 6 Q. B. 65); *Moore v. Metropolitan Railway Company* (25 L. T. Rep. N. S. 951; L. Rep. 8 Q. B. 36); *Green v. General Omnibus Company* (2 L. T. Rep. N. S. 95; 7 C. B. N. S. 290); *Bolingbroke v. Swindon Local Board* (30 L. T. Rep. N. S. 723; L. Rep. 9 C. P. 575). For the respondents it was argued that the manager must be taken to have authority to institute such proceedings. The appellants were incorporated by an Act of Parliament, giving them very wide powers, which of necessity must be exercised by some one on their behalf. It was for them to show that these powers were not vested in the general manager. It is unnecessary to go through all the cases cited on the other side, but the case of *The Eastern Counties Railway Company v. Brown* (*ubi sup.*), which is an authority against the respondent, was distinguished in the case of *Giles v. The Taff Vale Railway Company* (2 E. & B. 822; 23 L. J. 43, Q. B.) The direction of the learned judge at the trial was right.

*Benjamin, Q.C.*, was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

*March 28.*—THEIR LORDSHIPS gave judgment as follows:—This is an action for a malicious prosecution brought against the Bank of New South Wales, an incorporated company. The circumstances leading to the prosecution, which it is now admitted was groundless, are the following: In March, 1876, a bill at thirty days sight for 1500*l.* was drawn by Messrs. Morgan, Connor, and Glyde, a firm trading at Adelaide in South Australia, upon the plaintiff Mr. Owston, a merchant trading at Sydney under the firm of Owston and Co. The bill was drawn against a consignment of wheat shipped on board the *Sea Gull*, and was sent with the shipping documents by the Adelaide branch of the defendants' bank to the head bank at Sydney. On Saturday, the 18th day of March, the bank left the bill with the plaintiff for acceptance. He wrote his name upon it, but it was not called for until the morning of Tuesday the 21st. Meanwhile, on the afternoon of Monday, the 20th, the plaintiff had received the following telegram from the drawers: "*Sea Gull*, put back leaky;" and on the same afternoon he telegraphed in reply, "Do you wish us to accept draft, or will you instruct extension of sixty days?" On

the morning of Tuesday, the 21st, about eleven o'clock, a clerk from the bank called for the bill, and the plaintiff showed him the telegrams. He did not give the bill to him, but sent a clerk to the bank to explain the matter, and it was arranged that the bank should wait until one o'clock for the return of the bill. About that hour, and before the plaintiff had received an answer to his telegram, he returned the bill to the bank, having previously cancelled his acceptance. In the afternoon of the same day the following telegram from Adelaide reached the plaintiff:—"Bank instructed extend draft to sixty days." A telegram to the same effect was received by the bank. The bill, when returned to the bank by the plaintiff, was sent on the same afternoon by Hobbs, one of its clerks, to Messrs. Allen, Bowden, and Allen, who are notaries, and also solicitors of the bank, to be presented by them for noting, and what took place with respect to this presentment produced the misunderstandings which led to the prosecution complained of. On the following day, Wednesday, the 22nd, a clerk of Messrs. Allen and Bowden, a lad called Muir, brought the bill to the plaintiff for acceptance. The plaintiff's evidence is to the effect that he understood the lad to be one of the bank clerks, and having in his mind the telegrams as to the alteration of the days of sight, he inquired of him how the bank wished the acceptance to be. The clerk said he knew nothing about that. The plaintiff then told him that he would accept the bill, and send it round to the bank, and it was left with him. Shortly afterwards Bishop, another clerk of Messrs. Allen and Bowden, came for the bill, and demanded to have it returned. According to the plaintiff's evidence he was not aware that Bishop was other than a bank clerk. He says that he again inquired how the bill was to be accepted, and told Bishop he would accept and send the bill to the bank. He says Bishop behaved in a violent manner and declared that he should treat what he had said as a refusal to return the bill. The plaintiff's account of these conversations is contradicted, but for the purpose of this general statement may be assumed to be correct. The plaintiff in fact soon after sent the bill to the bank, accepted, having first made it payable at sixty days sight, and it appears to have reached the bank about one o'clock. Unfortunately the fact of the return of the bill was not communicated by the bank to Messrs. Allen and Bowden, as it ought to have been, and they remained under the impression that the plaintiff was still keeping it in his possession. Another interview took place between Bishop and the plaintiff; they met in the street. The plaintiff declined to have anything to say to Bishop, and unfortunately did not tell him what would have prevented further trouble—that the bill had been sent to the bank. Bishop said, on parting, that he would go for the police. A consultation was held in Messrs. Allen and Bowden's office, and apparently on the assumption that the plaintiff was improperly withholding the bill, and that they as notaries were responsible to the bank for its return, it was resolved to take

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criminal proceedings. Bishop and Muir then went to the police magistrate and applied for a warrant to apprehend the plaintiff on the charge of stealing the bill. The magistrate refused to grant a warrant, but issued a summons to the plaintiff to appear on the next day to answer a charge of feloniously stealing a bill of exchange of the value of 1500*l.*, the property of the bank. The information was laid by Muir. As soon as he was served with the summons, the plaintiff went to the bank, and after inquiring for the general manager, who was engaged, saw Mr. Wilkinson, the acting manager, and complained to him of the course which had been taken. There is great conflict of testimony as to what occurred at this interview, but an explanation then took place, and there seems no doubt that after the interview it was resolved not to press the charge. Application was made by the solicitors to the magistrate to be allowed to withdraw it, which was refused, and upon the case being called on the next morning, the plaintiff being present in obedience to the summons, no evidence was offered in support of the charge, and the case was dismissed. The plaintiff then brought the present action against the bank. On the trial Manning, J., properly held that the prosecution was without reasonable cause, and it was found by the jury to have been commenced from improper motives, and was therefore malicious. No question now arises on this part of the case. The two questions which were mainly contested at the trial and argued at their Lordships' bar are: (1) whether the proceedings of Messrs. Allen and Bowden were authorised by Wilkinson on behalf of the bank; and (2) if they were, whether the bank was responsible for Wilkinson's acts. At the trial the jury specially found the first question in the affirmative. Upon the second question, the learned judge told the jury, according to his own statement of his direction, "that it was to be inferred from Mr. Wilkinson's position as manager that he had sufficient power under the circumstances for directing a prosecution," and the verdict passed in accordance with this ruling. A rule *nisi* to enter a nonsuit or for a new trial was granted on the following grounds: 1. That the special finding of the jury (that Mr. Wilkinson authorised the prosecution) was against evidence, and had no evidence to support it. 2. That the judge was in error in directing the jury that the acts of Mr. Wilkinson, the acting manager, were, as regards the prosecution, the acts of the bank for which the bank was responsible. 3. That there was no evidence that the prosecution was in fact or in law a prosecution by the bank. This rule, after an argument before Martin, C.J., Hargreave and Manning, JJ., was discharged. The Court was unanimous in refusing to disturb the finding of the jury as to Wilkinson having authorised the proceedings; but on the question of the correctness of the ruling of Manning, J., as to the responsibility of the bank for his acts, which that learned judge and Hargreave, J., sustained, the Chief Justice dissented from his colleagues. One point argued in the Court below was that the

bank, being a corporation, could not in any case be liable to an action of this kind. The Chief Justice (the other judges taking the opposite view) held the law to be so, to use his own words, "on the plain ground that malice being a state of mind, cannot be attributed to a corporation which has no mind," and he relied on the judgment of Alderson, B., in *Stevens v. The Midland Counties Railway Company and Lander* (10 Ex. 352), which, as reported, no doubt supports this view. The learned counsel for the appellant acknowledged that, after recent decisions, he could not support this broad proposition, and confined his argument to the two questions above indicated. Upon the first of these questions their Lordships cannot say that there is not some evidence to support the finding of the jury; and that finding having been sustained by the judgment of the Court below, they intimated to the learned counsel at the close of the argument for the appellants that they should not feel justified in sending the case to a new trial upon this point, if it stood alone. The point remaining for consideration, viz., the liability of the bank for the acts of Wilkinson, is of more general importance. The first question which arises on this point is whether the direction of the learned judge to the jury to the effect that it was to be inferred from Wilkinson's position that he had authority to direct the prosecution — thus practically withdrawing the question from the jury — was correct, and their Lordships think that upon the evidence given at the trial it was not. No proof was offered by the plaintiff of the position, duties, and powers of the acting manager; but the defendants examined him, and also the general manager, who gave evidence on the question of his authority. Before considering the effect of this evidence, it will be convenient to refer to the series of authorities cited at the bar. They all related to the liability of railway companies for wrongful arrests by their servants. In each of the two earliest cases, *The Eastern Counties Railway Company v. Broom* (6 Ex. 314), and *Roe v. The Birkenhead, &c., Railway Company* (7 Ex. 36), the plaintiff, who had been arrested at a station for refusal to pay the fare demanded, brought an action for false imprisonment. In both the question arose as to the authority of the officers at the station to make the arrest, and in both it was held there was not sufficient evidence of such authority to go to the jury. The decision in the first of these cases, upon the insufficiency of the evidence for the consideration of the jury, is scarcely consistent with later authorities. In the last of them, Parke, B., thought there was no proof that the servant "had ever received any general authority from the company to arrest any person who did not pay his fare, nor was there any evidence of any course of dealing to show that, as a servant of the company, he was authorised to make any arrest on their behalf." In the latter cases a more particular inquiry was made into the character of the employment of the officer, whose acts were in question, and the nature of the duties entrusted to

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him. In *Goff v. The Great Northern Railway Company* (3 El. & El. 672; 3 L. T. Rep. N. S. 850) the plaintiff had been arrested for travelling on the line without a proper ticket by an inspector of the company acting under the direction of the superintendent of the station. By the Railway Clauses Act (10 Vict. c. 20), s. 8, a penalty is imposed on any person travelling on a railway without having paid his fare, with intent to defraud, and power is given to all officers and servants on behalf of the company to apprehend such persons. There was evidence that the superintendent was the person in supreme authority at the station, and the jury having found for the plaintiff, the Court refused to set aside the verdict, on the ground that there was no evidence for their consideration. Blackburn, J., in delivering the judgment of the court, observes: "The Court thought that, as from the nature of the case the question whether a particular passenger should be arrested or not must be made without delay, and as the case may not be of unfrequent occurrence, it was a reasonable inference that in the conduct of their business the company should have on the spot officers with authority to determine, without the delay attending on convening the directors, whether a person accused of this offence should be apprehended." And the Court held there was evidence for the jury that the persons who apprehended the plaintiff had such authority, observing that it was difficult to see why the company paid the police if the inspector of their police was not to act for them to this extent. This case turns therefore on the considerations that the summary power of apprehension given for the protection of the company could only be exercised (practically) on the spot, and instantly, and that the officers who acted were the fittest and indeed the only representatives of the company on the spot who could exercise it, and upon these considerations it was held that the jury might infer the necessary authority. In the later case of *Edwards v. London and North-Western Railway Company* (L. Rep. 5 C. P. 445; 22 L. T. Rep. N. S. 656), it was held that there was no evidence of the officer who had made the arrest having such authority. There a foreman porter who had the superintendence of the station yard in the absence of the station-master, gave the plaintiff into custody on a charge of stealing timber which the foreman porter suspected to be the property of the company. The timber was in a van at the station. It did not appear that any timber was in the special charge of the foreman. The plaintiff was well known, and in fact a gateman in the service of the company. It was held that there was no evidence of implied authority arising from the foreman's position to give into custody persons whom he might suspect to have stolen the company's goods. The apprehension in this case was not in pursuance of any special duty entrusted to the servant, to enforce laws or bye-laws. The Court recognised the distinction that in the case of such a duty, authority might under certain circumstances be presumed, but



held that the general authority sought to be inferred from the position of the foreman could not be so presumed. Other decisions adopt this distinction. In *Moore v. Metropolitan Railway Company* (L. Rep. 8 Q. B. 36; 25 L. T. Rep. N. S. 951), the facts of the case were held to bring it within the authority of *Goff v. The Great Western Railway Company*. The case of *Poulton v. The South-Western Railway Company* (L. Rep. 2 Q. B. 534; 17 L. T. Rep. N. S. 11) was a peculiar one. The station-master had arrested the plaintiff for non-payment, not of his own fare, but that of his horse; the law giving power to detain only for the former. Although it appeared that the station-master acted in the belief that the law authorised the arrest, and that he was protecting the interests of the company, it was held that his act was not within the scope of his authority, since it could not be inferred that the company had authorised him to do an act which under no circumstances could be lawful, and which they had no power to do themselves. A question in some respects similar arose in *Allen v. The London and South-Western Railway Company* (L. Rep. 6 Q. B. 65; 23 L. T. Rep. N. S. 612). It is to be observed that although in both these cases the defendants happened to be railway companies, the questions involved in them might equally arise in the case of other masters. In the last it appeared that a clerk whose duty it was to issue tickets and put the money received in a till, which was kept under his charge, having given some money in change to the plaintiff, who objected to one of the coins, a dispute arose, and the plaintiff, it was alleged, put his hand into the till. The clerk thereupon seized the plaintiff and gave him into custody, and the next morning charged him before a magistrate with feloniously attempting to rob the till. Blackburn, J., who tried the cause, left it to the jury to say whether the clerk acted for his own ends and out of spite in consequence of the dispute, or whether he acted in furtherance, as he supposed, of the interests of his employers to protect their property. The jury found that the clerk was acting in defence of the company's property, and returned a verdict for the plaintiff. The Court set this verdict aside and entered a nonsuit. It does not appear whether the clerk when he gave the plaintiff into custody believed or suspected that he had actually taken any money, though the finding of the jury affords an inference that he acted under that belief. The charge, however, was for the attempt only, and the decision assumed there had been no more than an attempt. Blackburn, J., put two cases, as supposed cases only, and his so putting them shows how little questions of this kind have been before the courts. He said he was disposed to think that if a servant in charge of money found another attempting to steal it, and could not prevent him otherwise than by taking him into custody, he might have an implied authority to arrest him, or if he had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, that also might be within the

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authority of the person in charge of it. The learned judge, however, declined to pronounce a decided opinion on these cases, and held that there was clearly no implied authority to give the plaintiff into custody for an attempt to steal which had failed. In none of the cases referred to did the question of the authority of a manager or agent entrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer, unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a like authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man who he had reason to believe was attempting to steal, or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority. The liability of the bank in this case must rest either on the ground of some general authority in the acting manager to prosecute on behalf of the bank, or on a particular authority so to act in cases of emergency. The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shown, to be within the scope of his authority; and his employers would be liable for his mistakes, and, under some circumstances, for his frauds, in the management of such business (*Mackay v. The Commercial Bank of New Brunswick*, L. Rep. 5 P. C. 394; 30 L. T. Rep. N. S. 180.) But the arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and when the question of a manager's authority in such a case arises, it is essential to inquire carefully into his position and duties. These may, and in practice do, vary considerably. In the case of a chief or general manager, invested with general supervision and power of control, such an authority in certain cases affecting the property of the bank might be presumed from his position to belong to him, at least in the absence of the directors. The same presumption might arise in the instance of a manager conducting the business of a branch bank at a distance from the head office and the board of directors. But whatever may be the case in instances of this kind, their Lordships think that such a presumption cannot properly be made from the evidence given at the trial as to the position held by Mr. Wilkinson. It appears that the board of directors held their meetings at the bank office, and the general manager, Mr. Smith, also sat there; and the

clear inference from the evidence (if believed) is that the acting manager was subordinate to the general manager, and that the latter was, as he presumably would be, subject to the superior authority of the directors. Supposing this to be so (and if the facts were disputed the opinion of the jury should have been taken upon them), their Lordships think it cannot be presumed from his position alone that the acting manager had general authority to prosecute on behalf of the bank, and therefore that evidence was required to show that such a power was within the scope of the duties and class of acts he was authorised to perform. The plaintiff offered no evidence whatever on this point; and the testimony of the two managers directly negatives the possession of such a power by the acting manager. Their statements at the most raise the question whether Wilkinson had authority so to act in cases of emergency, where immediate action is required, and the opportunity of arresting the offender might be lost if reference was made to the general manager or the directors. Granting that these statements afford some proof of such an authority, the further question would arise whether there is evidence that an emergency in fact occurred. An authority to be exercised only in cases of emergency, and derived from the exigency of the occasion, is evidently a limited one, and before it can arise a state of facts must exist which shows that such exigency is present, or from which it might reasonably be supposed to be present. If a general authority is proved, it is enough to show, commonly, that the agent was acting in what he did on behalf of his principal. But in the case of such a limited authority as that referred to, the question whether the emergency existed, or might reasonably have been supposed to exist, arises for decision; and that question raises issues beyond the mere fact that the agent acted on behalf of and in the supposed interests of the principal; were it otherwise, the special authority would be equivalent to a general one. What then was the situation when these unwarrantable proceedings took place? It cannot possibly be considered that it raised a case of emergency requiring immediate action by criminal proceedings against a person in the plaintiff's position, or afforded reasonable ground for supposing that such a case had arisen. There was no necessity for immediate action, nor was immediate action in fact taken. Then plaintiff was not at once given into custody, but an information was laid before a magistrate, and when he very properly refused a warrant to apprehend him, the summons complained of was taken out when there could evidently be no urgency either to obtain or serve it. It was obviously an attempt of the notaries and solicitors to recover the bill by means which were thought by them to be more effectual for the purpose than civil proceedings would be. Their Lordships therefore think, upon facts which appear upon the evidence to be beyond dispute, that there was no necessity or apparent necessity for immediate action from which authority in the acting manager

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to instruct the solicitors (if he really did instruct them) to take these proceedings on behalf of the bank could be inferred. It is to be observed also that the bill in question was not under Wilkinson's special charge. He says "the matter was not in his department. It was a branch business; the general manager takes that." There being then no evidence of any emergency, the case in their Lordships' view is brought to the issue that the bank would not be liable for the acts of Wilkinson unless it could be established that he had some general authority to institute criminal proceedings. They have already said that they think such an authority cannot be inferred from his position alone as it appears upon the evidence, and that the direction of the learned judge was wrong. The verdict therefore cannot stand. In case the action should be again tried, the jury should be told, if the evidence on the point should be to the same effect as on the first trial, that the facts do not present a case of emergency, or apparent emergency, from which authority could be derived, and consequently that the bank would not be liable for the act in question unless it is proved, or can be inferred from the evidence, that general authority to prosecute offenders for stealing the bank's property connected with its business at Sydney, without consulting the general manager or the board of directors, was within the scope of Wilkinson's employment and duties, and the powers entrusted to him in relation thereto. The question whether Wilkinson in fact authorised the solicitors to prosecute the plaintiff will of course be open on the second trial. In the result their Lordships will humbly advise Her Majesty to reverse the judgment of the Supreme Court discharging the rule, and to direct that the rule be made absolute for a new trial. The respondent must pay the costs of this appeal.

Solicitors for the appellants, *Waltons, Bubb, and Walton.*

Solicitor for the respondent, *W. H. Gatty Jones.*

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## COURT OF CRIMINAL APPEAL.

*Saturday, March 22, 1879.*

(Before Lord COLERIDGE, C.J., LUSH, J., POLLOCK, B. and  
HUDDLESTON, B., and FITZJAMES STEPHEN, J.)

REG. v. HERMANN. (a)

*Coining—Uttering false and counterfeit coin—Sovereign reduced in weight by filing off the milling—Making a new milling—24 & 25 Vict. c. 99, s. 9.*

*The prisoner was convicted of uttering two false and counterfeit sovereigns, with guilty knowledge. The two sovereigns were originally genuine, but had been reduced in weight by filing off nearly all the original milling. New millings were then made to them fraudulently, so as to make them resemble genuine sovereigns.*

*Held, that the two sovereigns when passed in that state were false and counterfeit coins, within sect. 9 of 24 & 25 Vict. c. 99, per Lord Coleridge, C.J., Pollock, B., and Huddleston, B. (Lush, J., and Fitzjames Stephens, J., dissenting).*

CASE reserved for the opinion of this Court by the Recorder of Liverpool.

The prisoner, Robert Hermann, was convicted before me at a sessions held on the 7th Jan. 1879, on an indictment under sect. 9 of the Act 24 & 25 Vict. c. 99—"An Act to consolidate and amend the Statute Law of the United Kingdom against offences relating to the coin,"—for uttering and putting off two false and counterfeit sovereigns, knowing them to be false and counterfeit.

The evidence of uttering, and of guilty knowledge, was complete; but I desire to submit to the Court the question whether the coins which were uttered could properly be held to be false and counterfeit coins within the meaning of the statute in question.

They were, or had been, real sovereigns, coined at the Mint.

They were both of Her Majesty's reign—one dated 1872, and the other 1875.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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They had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part. The effect of the filing was to remove the milling entirely, or almost entirely.

In order to restore the appearance of the coins, a new milling had been made on each coin with tools.

It appeared to me that this was a counterfeit milling, and that a coin upon which any part of the impression was counterfeit, was a counterfeit coin.

The jury convicted the prisoner.

I remanded the prisoner to Her Majesty's gaol at Walton, near Liverpool, without sentencing him until this case shall have been decided.

It may be desirable to add that the prisoner had first been tried under the 4th section of the same Act, and acquitted for want of evidence that the act of lightening or diminishing had been done by himself.

(Signed), JOHN B. ASPINALL, Recorder of Liverpool.

No counsel appeared for the prisoner.

*Eyre Lloyd* for the prosecution.—The prisoner was guilty of uttering or putting off false and counterfeit coins, resembling, or apparently intended to resemble, the Queen's current gold coin, within sect. 9 of the 24 & 25 Vict. c. 99. If it is a question of fact for the jury whether the coin uttered by the prisoner was counterfeit, the case is concluded by the verdict of guilty. But if it is a matter of law, it is contended that the filing off the original millings of the sovereigns, and the making of the new millings with the intention that they should pass for genuine sovereigns, makes them counterfeit coins within the Act. The intent in making the new milling was that they might imitate genuine sovereigns. [HUDDLESTON, B.—Your difficulty arises on the meaning of the words "false or counterfeit coin" in the interpretation clause, sect. 1.] If there had not been a new millings put on, there would have been greater difficulty in contending that the coins became counterfeit, but the new milling was an act of imitation, and gave them a spurious character. [POLLOCK, B.—In construing the words, "resemble, or apparently intended to resemble," does it matter that the coin was once a genuine one?] No. By removing the original milling, the sovereign lost one of its essential attributes—weight; and if of less than the authorised weight it ceases to be a legal tender, and any person may cut, break, or deface it, if tendered to him in payment, and the person tendering shall bear the loss (33 Vict. c. 10, s. 7). [LORD COLERIDGE, C.J.—What does "counterfeit" mean?] A thing made in imitation of another, and intended to pass for the original.

The Judges differing in opinion, the junior judge first delivered his judgment.

FITZJAMES STEPHEN, J.—I am unable to arrive at the con-

clusion that there was in this case the uttering of a counterfeit coin within the meaning of the Act. The interpretation clause, sect. 1, enacts that "the Queen's current coin shall include any coin coined in any of Her Majesty's mints, or lawfully current by virtue of any proclamation, &c." Now this piece of coin was certainly a gold coin coined in one of Her Majesty's mints, and not a thing made to imitate such a coin. Therefore, it seems to me that we start with this fact that it was a genuine coin; and then the next thing that appears is that it had been lightened in weight by filing off the edges, and so removing the milling, which constitutes an offence under another section (sect. 4) of the Act. And sect. 5 makes it an offence for anyone to have in his possession any filings or clippings of any gold or silver bullion, &c., which shall have been produced or obtained by impairing, diminishing, or lightening any of the Queen's current gold or silver coin. But I do not find any provision in the Act which seems to me to make a genuine coin which has been fraudulently lightened become a counterfeit coin, or to make a person who passes such a coin guilty of the offence of passing a counterfeit coin. If a man had passed a coin, knowing that it had been fraudulently lightened, he would not have committed the offence of passing a counterfeit coin. Then, would a person by putting on a fresh milling to conceal the fact that it had been so lightened, and to pretend that the coin was of full weight, be guilty of passing a counterfeit coin? The whole question is, does it thereby become a counterfeit coin within the meaning of the Act? I think it does not. It seems to me that this was a genuine coin fraudulently lightened in such a manner as to conceal the fact that it had been fraudulently lightened, and that it was not a counterfeit coin within the meaning of the Act. It is very difficult to describe the statutory meaning of a "counterfeit coin."

HUDDESTON, B.—I think that this conviction ought to be supported. The conviction was under the 24 & 25 Vict. c. 99, s. 9, which makes it a misdemeanour to put off any false or counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit. What the prisoner has been found guilty of is putting off a false and counterfeit coin resembling, or apparently intended to resemble, a sovereign. The evidence was that almost the whole of the milling had been fraudulently removed from a gold coin, and when the milling had been removed that was a coin which no one was bound to take, and in my opinion it then was no longer the Queen's current gold coin. And then in order to make that coin pass for a current coin another milling was put on, so as to make it apparently resemble the Queen's current gold coin. That was an act done to make it resemble, or apparently to resemble, the Queen's current coin, and so it was counterfeit.

POLLOCK, B.—I think that the prisoner was properly convicted.

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In dealing with the expression false or counterfeit coin in sect. 9, I think the interpretation clause, in clear and affirmative language, so defines it as to include this case. I agree with my brother Huddleston that when the original milling was taken off for the purpose of deteriorating the coin, the coin ceased to be a current coin; and taking that basis as a starting point, it seems to follow that it becomes something else; and then the putting on a new milling so as to make it pass for a genuine sovereign appears to me to make a counterfeit sovereign. A person having machinery might take off the milling from a great number of sovereigns and make a new milling so as to make them pass for the current gold coin of the realm. I have no doubt that that would be substantially putting off false or counterfeit coin, apparently intended to resemble the Queen's current gold coin, within the spirit and intention of the Act.

LUSH, J.—I cannot agree with the majority of the Court. In my opinion it would be straining the words "false and counterfeit coin" beyond their legitimate meaning to hold that the prisoner was guilty of uttering false and counterfeit coin within sect. 9 of the Act. Had there been nothing more done to the coins than filing off the original milling, and then passing them in that state, the prisoner could not have been guilty of uttering false and counterfeit coin, for they would still have been the Queen's current coin, though deficient in weight. The expression "false and counterfeit coin" involves the idea of spurious imitation, and the interpretation clause defines that "it shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble, or pass for any of the Queen's current coin of a higher denomination. If a farthing had been gilt over so as to be apparently intended to resemble a sovereign, it would have been counterfeit coin within the meaning of that clause. But I think the word "counterfeit" alone is not sufficient to include the present case. The prisoner was tried and acquitted for the offence under sect. 4, of impairing, diminishing, or lightening coin with intent that it might pass for the Queen's current gold coin. Another section (sect. 5) makes it an offence to have possession of any filings or clippings obtained by impairing, or diminishing, or lightening any of the Queen's current gold or silver coin, but there is no section which makes the attempt to pass off clipped or lightened coin an offence where it is intended to pass for coin of the same denomination. I think that the mere cutting off of the original milling and putting on a new milling, as in the present case, is not sufficient to turn the coin into false and counterfeit coin within the meaning of the Act.

Lord COLERIDGE, C.J.—I am clearly of opinion that this case is within the meaning of the Act, and am content to rest my judgment on either of these two views. First, I say that the prisoner was guilty of passing a counterfeit sovereign. What he

did was this, he filed off the milling from a genuine sovereign; and that being done, the sovereign, reduced below the proper weight, in my opinion, ceased to be a genuine current sovereign; he then made a new milling to it, and in that state passed it as a genuine sovereign. That, in my judgment, was putting off a counterfeit, resembling, or apparently intended to resemble, a genuine sovereign. That view may be wrong, however, and if so, I will rest my judgment on the ordinary sense of the word "counterfeit;" that is, imitation. By the act of the prisoner in removing the original milling, and making the new milling, the coin, which by the removal of the milling ceased to be a current coin or sovereign, was made by the new milling to resemble and pass for a current sovereign, that is in my view a counterfeit sovereign. The interpretation clause adds strength to this view; it says in plain language that the expression "false and counterfeit coin resembling, or apparently intended to resemble, or pass for any of the Queen's current gold or silver coin, shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble, or pass for any of the Queen's current coin of a higher denomination." That is an inclusive, but by no means an exclusive definition. It is said only to include such cases as where a farthing is gilt or silvered so as to resemble, or be apparently intended to resemble, the Queen's current coin of a higher denomination. It cannot be limited to mean really imitating a sovereign or coin of higher denomination, because the counterfeit in fact does not imitate them; there are differences in the inscriptions, and other parts of the coins. I think the term counterfeit applies where anyone does anything which shall have the effect of making a coin which is no longer a genuine current coin pass for a genuine current coin. On either of the above views I think the conviction may be supported.

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*Conviction affirmed.*

## COURT OF CRIMINAL APPEAL.

*Saturday, June 21, 1879.*

(Before Lord COLERIDGE, C.J., KELLY, C.B., DENMAN and FIELD, JJ., POLLOCK and HUDDLESTON, BB., MANISTY, LINDLEY, HAWKINS, and LOPES, JJ.)

REG. v. OWEN HUGHES. (a)

*Perjury—Petty sessions—Jurisdiction of justices—Illegal arrest—Want of information in writing or on oath.*

*H., a police constable, obtained an illegal warrant against S. for assaulting him and obstructing him in the discharge of his duty. H. arrested S. thereon, and took him before the magistrates in petty sessions, who convicted and sentenced S. to six months' imprisonment with hard labour.*

*No objection was taken by S. to the proceedings, and he called a witness to show he was not guilty.*

*H. was afterwards indicted for perjury committed by him at the hearing of the case at petty sessions, and convicted by the jury, subject to the opinion of this court as to the jurisdiction of the justices in petty sessions, because there was no written information nor oath to support the warrant.*

*Held (Kelly, C.B. dissentiente), that the justices had jurisdiction to hear and determine the case against S., notwithstanding he was brought before them on an illegal warrant, and there was no written information.*

CASE reserved for the opinion of this Court by Bramwell, L.J.

Owen Hughes was convicted before me at the last Anglesea Assizes (July, 1878) of perjury.

He swore falsely and corruptly on the hearing of a charge against John Stanley at petty sessions for an assault on him, Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty.

But it was objected that the defendant Owen Hughes should be acquitted on the ground that the proceedings were informal and without jurisdiction in the magistrates who heard the case.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Hughes went to the office of the clerk to the justices, saw there a clerk, and told him he wanted a warrant against John Stanley for assaulting him and obstructing him in the discharge of his duty. The clerk gave him a form of a warrant to that effect, which Hughes took to a magistrate, who signed it.

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There was no written information nor oath by Hughes or any other person to found or justify the issuing of the warrant.

Stanley, however, was arrested on the warrant by Hughes, and brought before the magistrates. The case was gone into of assault and obstruction. No objection was taken by Stanley, who defended himself and called a witness to show he was not guilty.

I overruled the objection, and, as I have said, the defendant Hughes was convicted.

I have now to ask the Court for the Consideration of Crown Cases Reserved whether, because there was no written information nor oath, I ought to have directed an acquittal. If I ought, the conviction should be quashed, otherwise not.

The defendant was discharged on bail, to appear at the next Assizes for Anglesea.

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Bramwell, L.J., stated further to the Court that there was no evidence at the trial before him that the warrant was produced before the magistrates; that no one then thought it necessary to inquire into such a matter; and that the case at the trial was conducted on the footing, that the case before the magistrates was conducted in the same way as it would have been if the warrant had been issued on a written information duly sworn to.

The case was argued twice, first on November 23rd and 30th, and December 6th, 1878, before Kelly, C.B., Mellor, Denman, and Field, JJ., and Pollock, B., and the Court, after taking time to consider its judgment, directed the case to be re-argued before a full Court, and it was re-argued accordingly before the above-named ten judges on March 8th and 15th, 1879.

*C. Bowen* for the prisoner.—The conviction cannot be sustained. It was essential that there should have been a written information to sustain the warrant for the arrest of Stanley. Without an information there is no charge, and without a charge there is no issue between the prisoner and the Crown. The necessity for the information appears from Paley on Convictions, 64 (5th edit.). The information or charge was the basis of the whole proceeding, and without that being laid upon oath, there was no legal trial or hearing before the magistrates in petty sessions, any more than there could be a criminal trial before a judge at the assizes without an indictment; all the proceedings were *coram non judice*. The only statute under which the sentence inflicted on Stanley could have been imposed is the 34 & 35 Vict. c. 112 (Prevention of Crime Act), s. 12, which enables justices to inflict a term of

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imprisonment not exceeding six months with hard labour for assaults on constables in the execution of their duty. Assuming the justices to have proceeded under the statute, sect. 17 enacts "that any offence against that Act may be prosecuted before a court of summary jurisdiction in England in manner directed by the 11 & 12 Vict. c. 43, and any Act amending the same." Sect. 1 of the 11 & 12 Vict. c. 43, enacts that in all cases where an information shall be laid or complaint made, the justices may issue a summons requiring the person summoned to appear to answer to the said information or complaint, provided also that no objection shall be taken or allowed to any information, complaint, or summons for any defect therein in substance or form, or for any variance between such information, complaint, or summons, and the evidence produced at the hearing of such information or complaint. Then sect. 2 enables justices, if they think fit, upon oath or affirmation substantiating the matter of such information or complaint, to issue their warrant to arrest the party charged or complained against if he does not appear to the summons. Sects. 4, 7, 8, 9 also show that it was intended by the Act that the information should be in writing. Sect. 10 enacts that every information for any offence punishable upon summary conviction, unless some particular Act of Parliament shall otherwise require, may be made or laid without any oath or affirmation being made of the truth thereof, except where the justices shall issue their warrant in the first instance (as here was the case), and in every such case the matter of such information shall be substantiated upon oath before any such warrant shall be issued. The language in sect. 10 is imperative and not directory merely. To give them jurisdiction the justices in petty sessions should have followed the course prescribed in 11 & 12 Vict. c. 43, and, not having done so, the proceedings were *coram non judice*, and perjury could not be committed by a person giving evidence under such circumstances. In *Caudle v. Seymour* (1 Q. B. 889) it was held that a justice's warrant was bad which did not show any information on oath on which the warrant was issued; and, further, that a deposition on oath taken by the justice's clerk, the justice not being present, nor at any time seeing, examining, or hearing the deponent, was irregular, and no justification for the proceedings founded upon it. If it be said that this is procedure, and does not affect the jurisdiction of the magistrate, that may be met by the observation of Coleridge, J., in *Caudle v. Seymour*: "It is true that a magistrate here has jurisdiction over the offence in the abstract, but to give him jurisdiction in any particular case it must be shown that there was a proper charge upon oath in that case. A man has no right because he is a magistrate to order another to be taken for an offence over which he has jurisdiction without a charge regularly made." So in the present case it is conceded that the justices had jurisdiction in the abstract over the offence, but it is contended that they had no jurisdiction in the charge against Stanley for want of a written information on oath. The cases of

*Reg. v. Pearce* (9 Cox C. C. 258; 22 L. J. 75, M. C.) and *Reg. v. Millard* (6 Cox C. C. 150; 22 L. J. 108, M. C.) were then referred to. In *Reg. v. Carr* (10 Cox C. C. 564) it was held that it should be proved distinctly, on the trial of an indictment for perjury, what the charge was on the hearing of which the false evidence was given. In that case Kelly, C.B. said: "This is an indictment for perjury, on the trial of which offence it is necessary to prove, first, that perjury was committed—that is, that the party charged has deposed on oath to something that is untrue; and, secondly, that that evidence is material to the issue before the tribunal where the inquiry takes place. In this case the perjury arises on the hearing of a charge against Lambe before certain magistrates, and the jurisdiction on their parts to entertain it is the point in question. We must see whether the case distinctly shows that the charge was made to and in the presence and hearing of the accused in order to ascertain whether what was sworn was material to the issue. The charge must be collected from the statement in the case, and looking at that, it appears that Lambe was in some way or other made personally to appear before the magistrates, when certain evidence on some charge or other was given. We find, first, that a summons seems to have been made out, but whether that was ever served, or left the magistrates' office, or was delivered to the police officer, or, if so, whether he ever showed it to the accused, does not appear. It is further stated that Lambe appeared before the magistrates, and evidence was heard which there is reason to believe was in relation to a charge of selling beer without a licence; but whatever may have been the charge, we look in vain for any charge distinctly stated, whether written or oral, on which the defendant gave evidence, and in relation to which such evidence is said to have amounted to perjury. Perjury is assigned in the indictment by alleging that the prisoner swore falsely on the hearing of the charge. To sustain that, the charge should distinctly be proved, and I nowhere find any statement—I do not mean on which we may not speculate as to the charge—but any such statement as distinctly shows the charge against Lambe. Two documents are set out, neither of which appears to have been shown or made known to Lambe. How do we know that the charge was not keeping open his house for the sale of beer at unlawful hours? I do not say that we are to infer that, but how can we say that Lambe may not have been before the magistrates without any summons or information, or any real charge having been made known to him? Under these circumstances, and without reference to the authorities cited, I think the conviction should be quashed." The case of *Reg. v. Scotten* (5 Q. B. 493; 13 L. J. 58, M. C.) also supports the defendant's conclusion, though that was not an indictment for perjury. The case of *Turner v. The Postmaster-General* (5 B. & S. 756; 34 L. J. 10, M. C.), which will be cited on the other side, depended on a particular statute. It

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has been said that a person by appearing waives an irregularity in the process by which he is summoned before the court, but it is contended that there can be no waiver in a criminal case of any matter which goes to the root of the jurisdiction of the justices. The information in writing was essential to the jurisdiction of the justices, and the want of that could not be waived. What charge was there when Stanley was brought before the magistrates? [DENMAN, J.—May not the magistrates have said to the constable when Stanley was brought before them, “What do you charge this man with?” and may not the constable have replied, “I charge him with assaulting me in the execution of my duty.”] That would not do, if a written information, as is contended, is necessary. There was no proof that the defendant was sworn in any judicial proceeding. If Stanley was brought before the bench for an offence under the 24 & 25 Vict. c. 100, he could not be convicted under the 34 & 35 Vict. c. 112: (*Martin v. Pridgeon*, 1 E. & E. 778; 28 L. J. 179, M. C.) The information is not mere process, but procedure, and goes to the root of jurisdiction. “The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion of the inquiry:” per Lord Denman, C.J. in *Reg. v. Bolton* (1 Q. B. 74). In *Reg. v. Brickhall* (33 L. J. 156, M. C.) a person was summoned under the 5 & 6 Will. 4, c. 76, s. 81, for assaulting a constable in the execution of his duty, but convicted under the 24 & 25 Vict. c. 100, s. 42, of a common assault, and Crompton, J., held that the conviction was made without jurisdiction. In the present case the false oath was not taken on the charge of which the prisoner was convicted. Sect. 4 of 11 & 12 Vict. c. 43, was evidently framed on the assumption that the information was to be in writing, and there could not be a waiver of the oath required to substantiate the information where a warrant is issued by magistrates in the first instance under sect. 10. The case of *Blake v. Beech* (L. Rep. 1 Ex. Div. 320) is a decision in the defendant’s favour. Most of the decisions where it has been said that the want of a summons or information was waived are civil cases.

*Poland* for the prosecution.—The conviction was right. The justices who heard the case had jurisdiction, and the false swearing of the defendant at such hearing amounted to perjury. The question is whether the hearing was *coram non judice*. The warrant was improperly issued, and Stanley was illegally arrested and brought before the justices, but he was before them, and his case was to be dealt with by them in some way. No question arises now as to the illegality of the arrest, or of the conviction of Stanley; the only question is whether all that took place at the hearing was *coram non judice*. [KELLY, C.B.—What do you say the charge before the justices was, and in what form was it made?] It is sufficient to say that a charge was made orally, and that upon the hearing of that charge the defendant swore

falsely and corruptly. Whatever was the form of the charge against Stanley before the justices, he had an opportunity of defending himself against it. A man may be charged in the first instance with a particular offence, and on the hearing it may appear that the man has committed a second offence. In such cases the justices exercise their discretion, it may be to commit summarily or send the case for trial, or to dismiss the first charge and convict for the second offence. Surely the magistrates have jurisdiction over the entire matter in such cases. In the present case the constable at the time of the commission of the assault might have arrested Stanley and taken him before the justices, and the charge then would have been oral. The warrant in this case was not the charge—it was merely the authority of the justices to arrest Stanley, and when Stanley was before the magistrates the charge was then made. [MELLOR, J.—Was Stanley in custody for the offence or any other offence legally?] Are the justices to enter upon a preliminary inquiry whether a person before them charged with a breach of the peace is legally brought before them? [KELLY, C.B.—Then what prevents a man not legally in custody from walking away? MELLOR, J.—The judges of the Superior Courts have power over all kinds of offences, yet the Courts never exercise the jurisdiction without inquiring into the legality of the proceedings. What more power has a justice of the peace?] The jurisdiction of a justice of the peace arises on a breach of the peace, and it arises when a person is brought before him charged with a breach of the peace, and that person has the opportunity of defending himself against the charge. There is no law that requires the charge to be made in writing. A man when brought before a justice on a charge is to be dealt with according to law, if the charge is one over which the justice has jurisdiction. The Vagrant Act (5 Geo. 4, c. 33, s. 6) authorises any person to apprehend a vagrant, and forthwith take him before a justice of the peace, to be dealt with according to the provisions of the Act. That is an instance where there is no preliminary formal charge, and the justice must necessarily inquire whether the person apprehended was found offending as a vagrant, and false swearing upon the inquiry would amount to perjury. In *Reg. v. Millard* (Dears. C. C. 166; 6 Cox C. C. 155) Wightman, J. ruled, on an objection at the trial of an indictment for perjury, “that the magistrates had jurisdiction to hear a charge under the Malicious Trespass Act (7 & 8 Geo. 4, c. 30, s. 24), although the information was not on oath, and that the omission to lay the information on oath was an error in procedure only,” and Jervis, C.J. said that Wightman, J., was right in saying that the information on oath was a matter of procedure only. Jervis, C.J., also said: “If a party charged appear before a magistrate, his jurisdiction is founded to hear and determine the case, but if he does not appear the proceedings must be under the 30th section of the 7 & 8 Geo. 4, c. 30, and there must be an information on oath in order to justify an *ex*

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*parte proceeding.*" In *Turner v. The Postmaster-General* (5 B. & S. 756; 34 L. J. 10, M. C.) the passage from p. 54 of Paley on Convictions was relied on, yet it was held that the want of an information and a summons was cured by the appearance of the appellants before the justices, and that they had waived the objection that they were not legally in custody on the charge, and therefore that the justices had jurisdiction to commit. A man may waive anything in the nature of procedure. *Blake v. Beech* (L. Rep. 1 Ex. Div. 320; 45 L. J. 111, M. C.); *Reg. v. Berry* (Bell C. C. 46; 8 Cox C. C. 151); *Reg. v. Hurrell* (3 Fos. & Fin. 171), were then cited.

*Bowen* in reply.—It is conceded that there may be a waiver of process, but not of procedure. Process is merely to bring a man before a justice, but where the procedure is dictated by statute, as in this case, by sect. 17 of 34 & 35 Vict. c. 112, the mode prescribed is a condition precedent to the jurisdiction which must arise at the commencement of the hearing. See note to *Cripps v. Durden* (1 Sm. Lead. Cas. 735.) In *Rex v. Fearshire* (1 Leach C. C. 202) Lord Mansfield, C.J., said that it was the indispensable duty of the magistrate to take all charges in writing of whatsoever nature, kind, or complexity they might be. In this case an information was required in writing, and the absence of it rendered the inquiry at petty sessions one *coram non iudice*.

*Cur. adv. vult.*

June 21.—LOPES, J.—The facts of this case and the Acts of Parliament and authorities which bear upon it have been fully gone into by the judgments of the other members of the Court which I have read. I agree in substance with the judgments which will be delivered, but do not desire to commit myself to any opinions which have been expressed collateral to the question before us. I think the warrant in this case was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices. I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, or was brought by force, or under an illegal warrant, is immaterial. Being before the justices, however brought there, the justices, if they had jurisdiction in respect of time and place over the offence, were competent to entertain the charge, and being so competent a false oath wilfully taken in respect of something material would be perjury.

HAWKINS, J.—I am of opinion that the conviction was right, and ought to be affirmed. In arriving at this opinion, I have assumed as a fact, from the case as stated, that Stanley was arrested and brought before the justices upon as illegal a warrant as ever was issued—a warrant signed by a magistrate not only without any written information or oath to justify it, but without any information at all. It follows that the magistrate who issued the warrant, and the defendant who with knowledge of the

illegality executed it, were liable to an action for false imprisonment. If authority were wanting for this, I need but refer to *Caudle v. Seymour* (1 Q. B. 899), and *Morgan v. Hughes* (2 T. R. 231), per Ashurst, J. Wrongful, however, as were the proceedings by which Stanley was brought into the presence of the magistrates, to answer a charge which up to that moment had never been legally preferred against him, yet before those magistrates, and in his presence, a charge was made over which, if duly made, they had jurisdiction. Upon that charge it was that the hearing proceeded, and in support of that charge it was that the defendant was sworn, and in giving his evidence swore corruptly and falsely. The case expressly finds that the alleged perjury was committed "on the hearing of a charge against John Stanley at petty sessions for an assault on him, Owen Hughes, and for obstructing him, being a police constable, in the discharge of his duty." Comparing this finding with the language of the 24 & 25 Vict. c. 100, s. 38, which enacts that "whosoever shall assault, resist, or wilfully obstruct any police officer in the due execution of his duty shall be guilty of a misdemeanour," I come without hesitation to the conclusion that the charge was that of the indictable offence created by that statute; and I do not think a doubt could have been suggested as to this, had we not been informed, in the course of the argument, that the justices in the result dealt summarily with the case, and convicted Stanley under sect. 12 of 33 & 34 Vict. c. 112, of an assault upon Hughes, being a constable, in the execution of his duty, and sentenced him to six months' imprisonment with hard labour. The case does not find in what form the charge was made, whether in writing or otherwise. In my opinion, writing was unnecessary; but even were it so, I would, in the absence of evidence to the contrary, assume it to have been properly made, as did Crompton, J., in *Turner v. The Postmaster-General* (34 L. J. 12 M. C.) Now, a charge having been made before them of an indictable offence, committed within their jurisdiction by a person then bodily present, it seems to me the justices were bound to take cognisance of it. The 17th section of 11 & 12 Vict. c. 42, expressly recognises the legality of depositions of witnesses taken in cases in which persons charged with indictable offences are "brought" before justices "with or without warrant." Had the justices proceeded upon the defendant's deposition to commit Stanley for trial, instead of convicting him summarily, it is difficult to see what possible objection could have been made to the legality of their proceedings. They did not, however, think fit to adopt that course. They took, it is true, the evidence on oath of the defendant, upon the charge for the indictable misdemeanour created by 24 & 25 Vict. c. 100, but, having done so, they proceeded to convict summarily under a different statute (34 & 35 Vict. c. 112) without, as I collect, any new information or charge of the latter offence; in short, they convicted him of an offence with which he had never been

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legally charged. In this I am of opinion they were wrong; and upon this ground I am strongly inclined to think the conviction may be quashed. *Martin v. Pridgeon* (1 Ell. & Ell. 778; 28 L. J. 179, M. C.) and *Reg. v. Brickhall* (33 L. J. 156, M.C.), more particularly referred to hereafter, are strong authorities in favour of this view. It does not, however, seem to me to be necessary to decide that point, for in the case before us we have only to determine whether the justices, at the moment when they swore the defendant in support of the charge which was made, had jurisdiction to hear that charge. Whether they afterwards pronounced a legal or an illegal judgment is immaterial to the present inquiry. Assuming, however, contrary to the view I have taken, that the charge upon which the defendant was sworn was an offence punishable upon summary conviction under 34 & 35 Vict. c. 112, and that verbal information of that offence was made before the magistrate who without written information or oath illegally issued the warrant under which Stanley was brought before the petty sessions, I should still be of opinion that the justices, in hearing that charge, and taking evidence in support of it, were acting within their jurisdiction. There is a marked distinction between the jurisdiction to take cognisance of an offence, and the jurisdiction to issue a particular process to compel the accused to answer it. The former may exist; the latter may be wanting. To found jurisdiction to take cognisance of an offence, notwithstanding the dictum of Lord Mansfield in *Rex v. Fearshire* (1 Leach C. C. 202), it has been constantly held that a written information is not necessary, per Grose, J., in *Rex v. Thompson* (2 T. R. 23), per Parke, B., in *Rex v. Millard* (6 Cox. C. C. 150; 22 L. J. 108, M. C.), per Erle, C.J., in *Reg. v. Shaw* (10 Cox C. C. 66; 34 L. J. 173, M. C.), and per Crompton, J., in *Turner v. The Postmaster-General* (*ubi sup.*) See also old forms of conviction, in which the information is set out thus: "A. B. giveth me to understand and be informed, &c." The information, which is in the nature of an indictment, of necessity precedes the process; and it is only after the information is laid that the question as to the particular form and nature of the process can properly arise. Process is not essential to the jurisdiction of the justices to hear and adjudicate. It is but the proceeding adopted to compel the appearance of the accused to answer the information already duly laid, without which no hearing in the nature of a trial could take place, unless under special statutory enactment. If a mere summons is required, no writing or oath is necessary—a bare verbal information is sufficient. If a warrant is required, then, and for that purpose only, an oath substantiating the information is requisite, not only by the provisions in Jervis's Act, so often referred to, but by the common law, of which it was always a doctrine that a warrant which deprives a man of liberty ought not to issue without oath of the truth of the information: (see *Rex v. Heber*, 2 Barnardiston, 101.) To justify a



warrant, I am also of opinion that a written information is necessary. In the case of indictable offences it is expressly made so by sect. 8 of 11 & 12 Vict. c. 42. The illegality of the warrant and of the arrest did not, however, affect the jurisdiction of the justices to hear the charge, whether that hearing proceeded upon a valid verbal information, followed by an illegal process, or upon an information for the first time laid in the presence of Stanley, upon which he was then and there instantly charged. The dictum of Holt, C.J. (1 Lord Raymond 509), is an express authority recognising the legality of a conviction upon an information *instanter*. Stanley might, it is true, had he known of the illegality of his arrest, have demanded his release from it, and prayed for an adjournment to a future day, to enable him to prepare his defence. This, I think, it would have been the duty of the magistrates to grant: (see per Crompton, J., in *Turner v. The Postmaster-General* (34 L. J. 13, M. C.), and per Blackburn, J., in *Reg. v. Shaw* (*Ib.* 173, 4). A refusal to do this, however, would not have destroyed their jurisdiction, though it might possibly have afforded good ground for setting aside the conviction on the ground that they had not allowed the accused sufficient opportunity to answer the charge. Another course might have been pursued, viz., to commence to hear, and if necessary adjourn the further hearing to a future day, a power expressly given by 11 & 12 Vict. c. 43, s. 16. It so happens, however, in the case before us that neither the magistrates nor Stanley were aware of the illegality of the warrant; and so the hearing proceeded without objection, and as if all things were in order. To use the language of the case, "the case was gone into of assault and obstruction," Stanley "defended himself, and called a witness to show he was not guilty," and in the result was convicted as I have above mentioned. Possibly that conviction may be open to the objection that the justices had no jurisdiction to convict of the offence created by statute 34 & 35 Vict. c. 112, when the only charge made against him was of the misdemeanour created by 24 & 25 Vict. c. 100, on the authority of *Reg. v. Brickhall* (*ubi sup.*), or upon the ground that under the circumstances Stanley had not such opportunity of answering and time to answer as he was in common justice entitled to: (see *Blake v. Beech*, 1 Ex. Div. 220.) The case of *Reg. v. Gillyard* (12 Q. B. 327) is a strong authority to show that the Queen's Bench have jurisdiction to quash a conviction upon other grounds than want of jurisdiction in the magistrates, *e.g.*, on the ground of fraud, conspiracy, and perjury in obtaining it. If the contention on the part of the defendant be correct, then Stanley, even though he had suffered the whole imprisonment to which he was sentenced would be liable to be tried again, and could not plead *autrefois convict*; and if he had been acquitted would have been in no condition to plead *autrefois acquit*—two very startling consequences. A flood of authorities might be cited in support of

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the proposition that no process at all is necessary when the accused being bodily before the justices the charge is made in his presence, and he appears and answers to it. In 2 Hawk. P. C. 281 it is said "it seemeth plain from the nature of the thing that there can be no need of process where the defendant is present in court, but only where he is absent." In *Rex v. Stone* (1 East, 649) Lord Kenyon said: "Justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be stated to be present at the time of the proceeding, and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient." *Reg. v. Shaw* (34 L. J. 169, M. C.; L. & C. 579; 10 Cox C. C. 66) is to the same effect, and appears to me to be decisive of the present case. The defendant in that case was convicted of perjury, committed upon the hearing of a charge punishable on summary conviction against one Kilshaw, a beershop keeper, under 18 & 19 Vict. c. 118. The proceedings, not being prescribed by that Act, were regulated, as are proceedings for the offence of which Stanley was convicted, by Jervis's Act (11 & 12 Vict. c. 43). At the trial no proof was given of any written information warranting a summons; indeed, the evidence showed that the summons was filled up by the magistrate's clerk, handed to a superintendent of police, who took it to a magistrate, who read and signed it without making any inquiry, or requiring any statement of fact—very like the circumstances of the present case. It was proved, however, that Kilshaw appeared before the justices, that the charge was then made against him, that he answered it, and that the defendant committed perjury in evidence which he gave on his behalf. It was objected that the justices had no jurisdiction to hear the charge against Kilshaw, because there was no information to justify the issuing of a summons. Erle, C.J., said: "In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such step." See also per Blackburn, J.: "I think when a man appears before justices, and a charge is then made against him, if he has not been summoned, he has good ground for asking for an adjournment; if he waives that, and answers the charge, a conviction would be perfectly good against him, and the witnesses, if they swore falsely, would be liable to indictment for perjury." To the same effect are *Reg. v. Millard* (*ubi sup.*); *Reg. v. Berry* (8 Cox C. C. 151; 28 L. J. 86, M. C.); *Reg. v. Simmons* (28 L. J. M. C. 183; 8 Cox C. C. 190); *Reg. v. Smith* (1 L. Rep. C. C. R. 110; 11 Cox C. C. 10); *Reg. v. Fletcher* (1 L. Rep. C. C. R. 320; 12 Cox C. C. 77); *Turner v. Postmaster-General* (5 B. & S. 756; s. c. 34 L. J. 10, M. C.) in

which latter case the defendants were in custody upon a charge of felony, which could not be sustained, but before the magistrates were charged with and convicted of a different offence, for which they could not be legally arrested without warrant or information on oath. The court upheld the conviction. I do not look upon *Blake v. Beech* (1 Ex. Div. 320) as deciding that the magistrates in the case then before them had no jurisdiction, but only that the conviction ought to be quashed for irregularity under the peculiar circumstances of that case. *Reg. v. Pearce* (3 B. & S. 531; s. c. 32 L. J. 75, M. C.) only decides that perjury cannot be committed by a witness who is sworn in a non-existing cause, which is undeniable. That case would have been a strong authority for the defendant if no charge had been made against Stanley before the defendant was sworn. *Reg. v. Scotton* (5 Q. B. 493; s. c. 13 L. J. 58, M. C.; and 1 New Sess. Cas. 27) was the strongest authority cited in favour of the defendant. That case, however, turned upon the peculiar language of the 6 & 7 Will. 4, c. 65, s. 9, "provided that before any proceeding shall be had or taken upon such informations the charge shall be deposed to on oath," &c. It does not become necessary therefore to consider how far that case has been affected by more recent decisions. In the course of the argument there was some discussion as to whether the warrant was produced before the justices. In my opinion, whether it was or not is immaterial; had it been so, it would have proved nothing, for it could not in any sense be treated as the information. It was the act and process of the magistrate alone, not the information of the informer, and the recital of an information in it would be no evidence that there was such an information in fact: (see *Stevens v. Clark*, 1 Car. & M. 509, Cresswell, J.). I have carefully considered the provisions of Jervis's Act (11 & 12 Vict. cc. 42 and 43), but I find in them nothing at all militating against the view I have expressed. The sections of those statutes to which our attention was called which regulate the formalities to be observed when a charge is made against an absent person whose presence it is desired to procure, do not seem to me to have any bearing upon a case like the present where the charge is made in the presence of the accused, who is then and there called upon to answer it, as he lawfully may be, according to the dictum of Holt, C.J., to which I have referred. In such a case it is, in my opinion, altogether immaterial, so far as the jurisdiction of the justices to hear that charge is concerned, whether the accused was before them voluntarily or otherwise, or on legal or illegal process. I have already pointed out that Stanley may have good grounds for asking that his conviction may be quashed, irrespective of the invalid objection raised by the defendant. But this conviction, in my opinion, ought to be affirmed.

POLLOCK, B., and LINDLEY, J., concurred in the judgment delivered by Hawkins, J.

MANISTY, J.—I am of opinion that this conviction should be

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affirmed. The case finds that Hughes swore falsely and corruptly on the hearing of a charge against Stanley at petty sessions for an assault on him (Hughes) and for obstructing him, being a police-constable, in the execution of his duty; and the question is whether the justices had jurisdiction to hear that charge, Stanley having been brought before them by means of a warrant signed by a magistrate, but which warrant had been issued without any information in writing or on oath. By virtue of the provisions in several statutes, which it is unnecessary for me to repeat, justices of the peace assembled in petty sessions have jurisdiction to hear a charge of an assault upon a constable in the execution of his duty, but it is only by the Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112) that they can summarily convict and punish for that offence. The charge made against Stanley might have been lawfully made and heard without any previous summons or warrant. Hughes might have apprehended Stanley in the act of committing the alleged assault; a magistrate seeing the alleged assault committed might have then and there ordered Stanley into custody; or Stanley, knowing or believing that he would be apprehended if he did not appear, might have appeared voluntarily before the justices to answer the charge, in any of which cases I cannot doubt but that the justices not only might, but must have heard the case and disposed of it somehow. It would be very strange, to say the least of it, if the law be that, notwithstanding the justices would have had jurisdiction to hear the charge if there had not been a warrant, they had no such jurisdiction in consequence of there being a warrant unsupported by sworn information. Nothing short of a clear statutory enactment would justify such a conclusion. That there is no such statutory enactment, I think, is clear. But it is said there are decisions which govern the case. The decision most relied upon on behalf of the prisoner Hughes in *Reg. v. Scotton* (5 Q. B. 493), but it will be seen by examining that case that the very ground upon which it was decided is wanting in the present case. The indictment was for perjury on the hearing before justices of an information laid under 1 & 2 Will. 4, c. 32, sects. 40 & 41, and the court held that the justices had no jurisdiction to hear it, because by sect. 9 of 6 & 7 Will. 4, c. 65, it was expressly made a condition precedent to any further step beyond the information that the matter of the information should be deposed to by oath of the informer or some other credible witness, and no such deposition had been made. Whether that case was rightly decided may, I think, admit of considerable doubt, having regard to the qualified language of the proviso at the end of sect. 9; but, assuming the right construction to have been put upon it, there is no such enactment in the present case, or anything like it. I think it unnecessary to review all the cases which were cited in the course of the argument, partly because I do not think that any of them are conclusive either way, but mainly because I found my judgment upon this, that the pro-

visions contained in the 17th section of the 34 & 35 Vict. c. 112 (which incorporates the 11 & 12 Vict. c. 43), relative to process or proceedings for the purpose of bringing accused persons before justices, are, in my opinion, directory only, and do not in any way affect the jurisdiction of justices to hear charges made against persons who are before them, and who are accused of offences over which the justices have jurisdiction. The proviso at the end of sect. 2 of 11 & 12 Vict. c. 43, strongly supports this view. We are not told by the learned Judge who has stated this case how the justices dealt with Stanley; but we are informed by counsel at the Bar that they convicted him summarily, and sentenced him to imprisonment. In my opinion it is immaterial for the present purpose how the justices disposed of the charge, the only question before us being whether the justices had jurisdiction to hear it, and to receive evidence upon oath in support of it. I think they had, and that the question put to us should be answered in the affirmative.

FIELD, J.—I also am of opinion that this conviction should be affirmed. I have nothing to add to the judgments already delivered, but only desire to say, as I differed from my brothers Cleasby, B. and Grove, J., in *Blake v. Beech* (*ubi sup.*), that I have carefully reconsidered my judgment in that case, and am unable to alter the view I then entertained.

HUDDLESTON, B.—The question in this case is, whether a conviction for perjury committed by the prisoner Hughes before justices should be quashed, because there was no information on oath for the warrant upon which Stanley, the party charged, was brought before the justices. The charge against Stanley before the justices was for obstructing Hughes, a police constable, in the discharge of his duty. It is not stated in the case under what statute the charge was made against Stanley; it might, therefore, have been under 34 & 35 Vict. c. 112, s. 12, by which he might be convicted summarily; or it might have been under 24 & 25 Vict. c. 100, s. 38, by which he might have been sent for trial to the assizes or sessions. If the charge be for an offence under the former Act, it may by sect. 17 be prosecuted in manner directed by Jervis's Act, 11 & 12 Vict. c. 43. Sect. 1 of that Act provides that, "where an information shall be laid that any person has committed any offence for which he is liable by law on summary conviction, the justice may issue his summons." This is the process by which the person to be charged is called on to appear. By sect. 2, "if being served the party does not appear, a warrant may issue, or a warrant may issue in the first instance if the justice shall think fit," but in both these cases the matter of the information must be substantiated to the satisfaction of the justice by oath or affirmation; and if the summons is not obeyed the justice may proceed *ex parte* on proof of due service. By sect. 10 it is declared (that is declaratory of the common law) and enacted that the complaint in case of an order, and the information in case of a summary

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conviction, shall be made or laid without any oath or affirmation except where warrants are issued in the first instance to apprehend, and then the matter of the information must be substantiated by the oath or affirmation of the informant. Sect. 13 deals with the appearance or default of the party charged; and provides that the case may be heard in his absence on due proof of the service of the summons, or a warrant for his apprehension issued and committal; and for the dismissal of complaint or information if the complainant or informant does not appear by himself, counsel, or attorney; for the adjournment of the hearing; and concludes thus, "but if both parties appear, either personally or by their respective counsel or attorneys, before the justice or justices who are to hear and determine such complaint or information, then the said justice or justices shall proceed to hear and determine the same." The object of all these provisions is to bring the party accused before the justices, to enforce his presence, and to enable them to deal with him in his absence; but when he is before them, the justices are required and shall proceed to hear and determine. The information on oath is not necessary to give the justices jurisdiction to try, though it is necessary to give them jurisdiction to issue a warrant to apprehend. The jurisdiction to try arises on the appearance of the party charged. Sect. 14 shows what is to take place at the hearing, "where such defendant shall be present at such hearing the substance of the information shall be stated to him." The word "stated" is important as pointing out that no summons, information, or other document, is to be read or shown to him. An information is nothing more than what the word imports; namely, the statement by which the magistrate is informed of the offence for which the summons or warrant is required, and it need not be in writing unless the statute requires it. The magistrate to whom it is made is not necessarily, and very often never is, one of the magistrates by whom the case is subsequently heard. In practice an information is never produced before the justices. If in writing, it remains with the magistrate granting the summons or warrant, as the warrant remains in the custody of the constable. The clerk to the justices, or the police officer present, states the substance of the information, that is, the nature of the charge; sometimes where there is a charge sheet, as in the metropolitan districts, reading from it—otherwise not. The charge sheet is merely the statement drawn up by the inspector at the station of the charge preferred before him. He states, in fact, the substance of the charge or information, and the prisoner is called on to plead. He may admit the truth and plead guilty, or he may not admit the truth and desire to be tried for it, or he may apply to adjourn or object to the jurisdiction. But if he make no objection (and here it is found that Stanley made no objection) the case must proceed. Principle and authority seem to show that objections and defects in the form of procuring



the appearance of a party charged will be gone by appearance. The principle is that a party charged should have an opportunity of knowing the charge against him, and be fully heard before being condemned. If he have the opportunity, the method by which he is brought before the justice cannot take away the jurisdiction to hear and determine when he is before them. The arrest of Stanley was no doubt illegal, there had been no information or oath to justify the warrant, and it might be that if the objection had been taken the magistrates might have entertained it, but they could then and there have issued their summons for Stanley's apprehension at once, on a verbal information which would be good (*Rex v. Fuller*, 1 *Ld. Raym.* 610), and have proceeded to hear and determine, though if the defendant objected, they ought to adjourn, so that he might know the charge and be prepared to meet it. *Rex v. Stone* (1 *East.* 649) was a conviction under the game laws, and the objection that there had been no summons was abandoned on argument, and Lord Kenyon at p. 649, and Mr. Justice Le Blanc at p. 654, point out that "justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be present at the time of the proceeding, and heard the charge of all the witnesses, and not have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient." This was a case in which the objection was made to the conviction that it did not appear on the face of it that the defendant was duly summoned, but the principle is the same. In *R. v. Shaw* (*L. & C.* 579, 10 *Cox C. C.* 66), where there was no information of any kind, Erle, C. J., points out that where the parties are before a magistrate who has jurisdiction in respect of time and place (as the magistrates had here), no summons or information is necessary to complete his jurisdiction, unless the obligation is imposed by the statute which constitutes the offence, and certainly that is not imposed by the 11 & 12 *Vict. c. 43*. Blackburn, J., in that case, says no information was required. It is material to know what the charge is, and here the case finds Stanley was charged with obstructing the police constable in the discharge of his duty. Sometimes a summons or other writing may be required, but no antecedent information is necessary. In the absence of one, the party to be tried may, if he please, ask for an adjournment, but if he does not do so the adjudication is good; and Montague Smith, J., says, no information or summons is necessary where the party appears voluntarily, and I do not think it makes any difference if he be there compulsorily). It is to be observed that this decision was in 1865, long after Jervis's Act came into operation. Indeed Jervis's Act (11 & 12 *Vict. c. 43*) is referred to by the prisoner's counsel. Mr. Bowen's argument in this case for the necessity of an information is entirely based on Jervis's Act (11 & 12 *Vict. c. 43*). This case is, therefore, a distinct authority that the absence of such an information is not fatal to the jurisdiction of the justices. In

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*Turner v. Postmaster-General* (5 B. & S. 756) it was held that though there was no information on oath (the 62nd section of 24 & 25 Vict. c. 97, the statute on which the defendant was convicted, requiring one) that after appearance and no objection made, no objection to the jurisdiction of the justices to convict could be taken, that any defect in bringing the party before the justices was cured by appearance and the merits of the case being gone into, and that the justices had jurisdiction. *Blake v. Beech* (1 Ex. Div. 320) is to the same effect. I wish to say that I subscribe to every word in my brother Field's judgment in that case. The judgments of Cleasby, B., and Grove, J., are based on the ground that the objection to the want of an information was distinctly taken before the magistrates. *R. v. Berry* (*ubi sup.*), *R. v. Fletcher* (*ubi sup.*), *Rex v. Fuller* (1 Ld. Raym. Rep. 509) support the same principle, though they were sought to be distinguished in argument by suggesting that the inquiry on which the perjury arose was of a *quasi* civil nature. The decision in *R. v. Scotton* (5 Q. B. 493) was on the ground that by the words of the statute 6 & 7 Will. 4, c. 65, s. 9 it was a condition precedent to any further steps that the matter of the information should be deposed to on the oath of the informer, or some other credible witness. I think, therefore, that Stanley being before the justices and no adjournment asked for, and being charged with an offence punishable by summary conviction, though there had been no information on oath for the warrant, that false swearing in a material point would be perjury. The passages quoted in the argument from Paley on Convictions and Smith's Leading Cases have reference to the statement of the information in the old form of conviction, where, of course, it became necessary to show in that part of the conviction all the ingredients to give jurisdiction. The form of conviction in Jervis's Act omits the information, but if the offence with which Stanley was charged was one under 24 & 25 Vict. c. 100, s. 38, for which he might be committed for trial at the assizes or quarter sessions, I entertain no doubt that there need not have been an information on oath or warrant to give the justices jurisdiction to hear and commit or discharge. The practice of justices with regard to indictable offences is regulated by Jervis's Act, c. 42, and s. 8, provides that where a warrant is to be issued there must be an information in writing on oath, but not where a summons only is issued. There is no section pointing out what is to be done at the hearing, as in Jervis's Act, 11 & 12 Vict. c. 43. But sect. 17, which applies to the examination of witnesses provides, "that where any person shall appear, or be brought before any justice, charged with any indictable offence, whether such person appear voluntarily upon summons or have been apprehended with or without warrant, or be in custody for the same or any other offence, depositions shall be taken and the oath administered before the witness is examined." The justice here, therefore, has expressly jurisdiction to administer the oath to the witness

when the party is charged before him, whether he appear or be brought there, and whether there be or be not a warrant; and, therefore, having jurisdiction to administer an oath, false swearing on a material point would be perjury. But apart from either statute, I do not think it can be doubted that a police constable would be justified in taking into custody without summons or warrant any person who was assaulting and obstructing him in the execution of his duty, and subsequently charging him with that offence. Upon such a charge being made (although it was entirely false) the magistrates before whom it is made must inquire into its truth, and to do so must have jurisdiction to administer an oath. False swearing in that inquiry on a material point would be perjury. In any view, therefore, I am of opinion that the conviction must be affirmed.

DENMAN, J.—I conceive the true meaning and effect of the case submitted to us by the learned Lord Justice to be as follows: John Stanley was improperly arrested by the defendant, Owen Hughes, a constable, who had obtained a form of warrant from the clerk to the clerk of the justices, which was filled up by the clerk or by Hughes in the usual form, as for a charge of assaulting and obstructing Hughes in the execution of his duty. This warrant was improperly signed by the magistrate without requiring any information either in writing or upon oath. The magistrates at petty sessions finding Stanley before them, and having been verbally informed, either by Hughes, or their own clerk, that Hughes charged Stanley with assaulting him and obstructing him in the execution of his duty, and without inquiring how Stanley had been brought there, administered an oath to Hughes, and took evidence in the course of which Hughes committed perjury, if perjury, in law, would be committed in such a case; the only point raised for our consideration being that the absence of a written information or of an information upon oath was fatal to a conviction for perjury. No question was raised at the petty sessions as to the existence of an information or as to the existence or legality of the warrant or arrest. These objections were first suggested upon the trial of Hughes for perjury. Stanley made no objection to the charge being heard, and called a witness in his own behalf. He was, in fact, as was admitted upon the argument, though not stated in the case, convicted and sentenced to six months' imprisonment with hard labour, a sentence which could only have been passed upon summary conviction under the powers of the 34 & 35 Vict. c. 112, s. 12. The case has been twice most ably and elaborately argued, and for some time I doubted whether the conviction could be sustained, but upon full consideration I am satisfied that it ought to stand. The main argument for the defendant was based upon the ground that the offence of which he was convicted was one under statute 34 & 35 Vict. c. 112, s. 12, and that by virtue of sect. 17 of that Act, coupled with the provisions of the 11 & 12 Vict. c. 43, thereby incorporated, the whole

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proceeding was void, and without jurisdiction for want of an information upon oath. I am of opinion, however, that we ought not to have regard to the conviction in considering whether perjury was committed, but to look to the moment at which the false evidence was given, and consider whether, at that moment, the magistrates had jurisdiction to hear that evidence judicially. And I think that they had jurisdiction to hear that evidence judicially, if, at the trial at which it was given, it was evidence which in any possible event they might have acted upon judicially in a matter within their jurisdiction whether the result of their acting upon it might have been to convict, or to acquit, or to adjourn, or to send for trial, or to take bail, or to do any other judicial act within their competency. At the moment at which the false evidence in question was given, it appears to me that there was nothing to compel the magistrates to inquire into the mode in which Stanley had been brought before them. If, as I suppose (and here I am putting the case as favourably as it can be put for the defendant) nothing more happened than that the magistrate inquired "What is the charge against that man?" and Hughes said in answer, "I charge him with assaulting me, and obstructing me in the execution of my duty." I apprehend that the magistrates would at once have had jurisdiction to put Hughes upon his oath, and inquire into several matters, upon any one of which the perjury might have been committed wholly without reference to what they might in the result feel themselves bound to do or not to do. For example, they might have inquired into the name and number of Hughes, and whether he were really a member of the police, and actually on duty at the time of the alleged assault; whether Stanley was really the person who had assaulted him or not, how he was dressed, whether he were alone, or with others, &c., and indeed even if the jurisdiction of the magistrates to convict depended upon whether he had arrested Stanley in the act, or arrested him upon a legal warrant afterwards obtained, this very question might have been a legitimate subject of inquiry. Considering that this was a case in which Hughes complained of an assault upon himself, it need not have occurred to the magistrates in the first instance that any warrant at all would have been necessary, for there is nothing in any of the statutes to repeal the common law which would have enabled Hughes if the charge were a true one, to bring Stanley at once before the magistrates, without any warrant at all. The charge actually made as stated in the case, according to my understanding of it, is much more nearly in accordance with the provisions of 24 & 25 Vict. c. 100, s. 38, than those of 34 & 35 Vict. c. 112, s. 12. It included a breach of the peace; and I can see no reason why the magistrates, at all events, in the absence of any objection on the ground of the illegality of the arrest, or the want of an information, should not have administered an oath, and inquired into the charge; at all events, until any doubt arose as to their jurisdiction to deal with it finally by conviction.

It was contended, that even under 11 & 12 Vict. c. 42, relating to indictable offences, the right of the magistrates to inquire would not be well founded in the absence of an information in writing or upon oath; but I am of opinion that there is nothing in that Act to destroy the jurisdiction of the magistrates to inquire into a charge of an indictable offence, where the person charged is actually in custody before them. The first section of that Act shows that the provisions relating to warrants and informations are not intended to apply in such a case, but are merely provisions for the purpose of bringing people not already in custody before the justices; but it is not necessary to consider further the question whether the conviction was good or bad, and I express no opinion upon it. Their jurisdiction to convict appears to me to be a totally different question from the question whether they had jurisdiction to take evidence in such a case. I cannot hold that the magistrates who tried and convicted Stanley (even if the conviction be one that cannot be supported) had no jurisdiction to administer an oath to Hughes, or that any evidence he gave relevant to a verbal charge of assault and obstruction was *coram non judice*. The case of *Reg. v. Scotton* (5 Q. B. 493) which at first seemed to me to be in favour of the defendant's contention, is, I think, clearly distinguishable on the ground that there the court thought that the only possible foundation of the magistrates' jurisdiction was an information, whereas in the present case there was nothing to prevent the magistrates proceeding to inquire into a charge which in at least one other lawful manner might have been brought before them without any information at all, and either adjudicated upon by them or sent for trial. In the view I take of this case it is necessary to discuss more fully the contention of the defendant's learned counsel as to the applicability of Jervis's Acts to the case upon the supposition that because the conviction was one under 34 & 35 Vict. c. 112, no evidence given upon the hearing could be the subject of an indictment for perjury in the absence of an information on oath or in writing. In my view all that was necessary to give the magistrates jurisdiction to hear evidence was that there should be before them a person charged with an offence within their general jurisdiction under such circumstances as to call upon them to take evidence before they could decide whether they should exercise or abstain from exercising some legal power which they possessed. For the reasons above given, I think such was the case here, and that the evidence falsely and corruptly given upon oath, and which must be taken to have been held by the learned Lord Justice to have been relevant and material to the subject matter of inquiry before the justices cannot be said to have been *coram non judice*. The indictment on being referred to, appears to have contained an allegation that the perjury was committed upon the hearing of a "complaint or information," and this is no doubt language which would at first sight lead me to expect that proof would have been given of a charge made

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otherwise than in the way in which it appears to me that the case states the charge in this case to have been made. But I do not think that the words "complaint or information" are inconsistent with a verbal charge made under the circumstances suggested above. The statute 14 & 15 Vict. c. 100, s. 20, which is applicable to the case provides that "In every indictment for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or equity, and without setting forth the commission or authority of the court or person before whom such offence was committed." All that is necessary since that statute is that the indictment should show that there was a proceeding pending before the court, over which the court had jurisdiction, and I think this does sufficiently appear in the present case, and that it is not necessary to tie down the meaning of the words to any particular form of information or complaint. For these reasons I am of opinion that the conviction ought to be affirmed.

Lord COLERIDGE, C.J.—I am desired to say that the Lord Chief Baron dissents from the judgment of the majority of the Court. I had myself prepared a judgment, but after having had the advantage of reading the judgment of my brother Hawkins, I should only be expressing, were I to read it, in less forcible language the conclusions at which he has arrived. Without binding myself to every single expression, I concur in the result, and the train of reasoning in his judgment. And this being the view of the majority of the Judges who heard the case, the conviction will be affirmed.

*Conviction affirmed.*

## COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

*Thursday, June 12th, 1879.*

(Before BRAMWELL, BRETT, and COTTON, L.JJ.)

NIGOTTI v. COLVILLE. (a)

*Sentence of imprisonment—Computation of time—One calendar month—Expiration of sentence.*

*A sentence of one calendar month's imprisonment expires on the day preceding that day which corresponds numerically in the next succeeding month with the day on which the sentence was passed. If there is no such corresponding day in the next month, then the sentence expires on the last day of that month.*

*Where a prisoner was sentenced to one calendar month's imprisonment on the 31st day of October,*

*Held (affirming the decision of Denman, J.), that the month expired on the 30th day of November.*

APPEAL from a decision of Denman, J. giving judgment for the defendant.

The action was to recover damages against the governor of Coldbath Fields Prison for alleged false imprisonment of the plaintiff. At the trial, before Denman, J. and a common jury, the following facts were proved in evidence or admitted.

The plaintiff was convicted by a Metropolitan police magistrate of two different assaults. The convictions took place at 11 a.m. on the 31st day of October, and the commitments were drawn up in accordance with the sentences passed. The plaintiff, for the first assault, was sentenced to be imprisoned for "one calendar month," and for the second assault "for fourteen days, to commence at the expiration of the imprisonment previously adjudged." The prisoner was accordingly taken into the custody of the defendant, who was the governor of Coldbath Fields Prison, during the afternoon of the 31st day of October, and finally released at 9 a.m. on the 14th day of December, having asked to

(a) Reported by W. APPLETON, Esq., Barrister-at-Law.



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be released on the preceding day. Denman, J. on these facts asked the jury to assess the damages (which they did at 20s.), and reserved for further consideration the question whether judgment ought to be entered for the plaintiff or defendant. After hearing the arguments of counsel on further consideration, the learned judge directed judgment to be entered for the defendant, with costs.

The plaintiff appealed.

The case in the court below is reported 40 L. T. Rep. N. S. 522.

The plaintiff in person contended that, as his imprisonment must be taken to have commenced at midnight on the 30th day October, the calendar month expired on the 29th day of November, and that being so, that he ought to have been released on the 13th day of December. Otherwise, he said, he would have been imprisoned the whole of November, which was a calendar month, and one day in October, and also for the fourteen days. He submitted that the question of time was one of fact for the jury.

*A. L. Smith*, for the defendant, was not called upon to argue.

BRAMWELL, L.J.—I am of opinion that this judgment must be affirmed. As Denman, J. said, there is no doubt a plausible argument for the now plaintiff that, according to his opinion, he has been imprisoned during the whole of November and one day in October as constituting one calendar month. The difficulty really arises because the term “calendar month” is not applicable except as applied to particular months, and that it is inapplicable where the month begins in the middle of a particular calendar month. Then the month is made up of a portion of two calendar months, which may be of unequal lengths, and various consequences seem to follow. It is clear that the only sensible rule which can be laid down is this, that where the imprisonment begins on a day in one month, so many days of the next month must be taken, if there are enough days to do it, as will come up to the date of the day before that on which the imprisonment commenced. That is to say, that, if the day of imprisonment commenced on the 5th day of the month, it must go on until the 4th day of the next month; if on the 29th, until the 28th. That is to say, you must take as many days out of the next month as had passed in the month when the imprisonment began before that imprisonment commenced. If that were not so, see what the consequences would be. The plaintiff says, “I was sent to prison on the 31st day of October. Therefore, I ought to have been let out on the 29th day of November. Otherwise I should have had one calendar month’s imprisonment, and one day of another month.” The effect of his argument is this, that whereas the imprisonment began on the 30th day of October, it ought to end on the 29th day of November. So ought it if the imprisonment began on the 31st. There is no reason why that should be so. Suppose a man is sentenced to

two calendar months' imprisonment, when does he come out? Certainly not until the 30th day of December. Now, if one month ends on the 29th day of November, how do you get the next month ending on the 30th? The only way to make sense of it is to apply the rule I have mentioned. It would never operate to the prejudice of the prisoner. If he was sent to prison in a long month he would get thirty-one days; if in a short one he would get thirty days. If he was sent to prison in February, so much the better for him. If he went to prison on the 29th day of January, according to the rule expressed he would get out on the 28th day of February; so he would if he went to prison on the 30th day of January, or on the 31st, or on the 1st day of February. He would then have the benefit of an imprisonment shortened by the number of the days wanting to make up the days which had elapsed in the month in which he was imprisoned at the time of his imprisonment. As the plaintiff was sent to prison on the 31st day of October, there were thirty days wanting from the next month, and, as a consequence, the month did not expire until the 30th. Then the fourteen days did not begin until the first, and the plaintiff therefore was duly kept in prison until the 14th. I think the judgment should be affirmed.

BRETT, L.J.—The expression one calendar month is a legal and technical phrase to which we must give a legal and technical meaning. It does not, strictly speaking, mean any particular number of days, but one month according to the calendar. We must therefore look to the calendar in calculating it, and not count the days. Now, one month according to the calendar, in my view, is one month from the day of the imprisonment until the corresponding numerical day of the next month less one. In some cases there is no corresponding numerical day in the next month, because it is a shorter month than the one in which the imprisonment begins. There the imprisonment is less than it otherwise would have been, and in favour of the prisoner it must end on the last day of the short month.

COTTON, L.J.—I am of the same opinion. I think Denman, J. was right in dealing with this point as a matter of law. It was for the judge to say, on the meaning and construction of the sentence, what was "one calendar month." The plaintiff contends that he could not be imprisoned during the whole of one calendar month and one day of another month. The question then is, what is the meaning to be given to the term "one calendar month?" I am of opinion, although difficulties and incongruities no doubt arise, that where there is a sentence of a calendar month's imprisonment not commencing on the first day of the month, you must consider it as expiring at twelve o'clock on the corresponding numerical day of the next month, and, if there are not enough days in the next month, in favour of the prisoner, the sentence will expire on the last day of the month. The consequence is that he never gets a longer imprisonment than the number of the days in the month in which he is to be imprisoned,

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and sometimes will get a less number of days' imprisonment than the number of days to be found in the calendar month for which he was imprisoned.

*Appeal dismissed.*

Solicitors for plaintiff, *Gold and Son.*

Solicitors for defendant, *Nicholson and Herbert.*

## Ireland.

### HIGH COURT OF JUSTICE.

#### COURT FOR CROWN CASES RESERVED.

(Before MAY, C.J., PALLAS, C.B., O'BRIEN, J., FITZGERALD, B.,  
LAWSON, J., and BARRY, J.)

*May 16 and June 4, 1879.*

REG. v. PATRICK GRIFFIN. (a)

24 & 25 Vict. c. 100, sect. 57—*Bigamous marriage contracted in foreign state—Evidence of laws of foreign state.*

*In a case of bigamy, a marriage contracted according to the rites of the Roman Catholic Church in a foreign state is presumed to be good without proof of the law of that foreign state relating to marriage.*

*Per Pallas, C.B., Fitzgerald, B., Lawson, J., and Barry, J.; dissentientibus, May, C.J. and O'Brien, J.*

CASE reserved by Fitzgerald, J., from the County Kerry Spring Assizes, 1879. The prisoner was indicted for bigamy. The evidence for the prosecution established that on the 18th day of February, 1871, the defendant was married to Julia Kennedy, who was alive at the time of the trial. The marriage was celebrated in the chapel of Kitalla, county of Kerry, by the Rev. James Sheehan, according to the rites of the

(a) Reported by CHAS. R. ROOPE, Esq., Barrister-at-Law.

Catholic Church. No question was raised as to the validity of that marriage, or as to the identity of the defendant. The defendant and Julia Kennedy cohabited as husband and wife, and some time after the marriage, but it did not appear when, the defendant went to America. The further evidence given to establish the alleged bigamous marriage was as follows: Johanna Barton was called as a witness, and deposed as follows: "I was born at Cahirciveen, and about fifteen years since I left this country and went to the United States of America, where I resided until about two years and a half ago, when I returned to Ireland. I know the defendant. I met him for the first time in Springfield, in the State of Illinois, about six or seven years ago. I was then, and had been for the five or six years previous, resident at Springfield. The defendant also resided there, and lived with his sister. He proposed marriage to me, and I accepted him, believing him to be, as he represented, a single man. I am a Catholic, and he professed to be a Catholic also. I attended the services of the Catholic church at Springfield, and have seen Father Burke and Father Brady officiate as Catholic curates. The banns were called three times for us in the church, and after that the defendant and I were present in the church, and were married by Father Burke, assisted by Father Brady. Father Burke read the marriage service from a book. I lived with the defendant for about five weeks after that as his wife, and I was received as such, and called Mrs. Griffin. Having got information that he had been previously married, and that his wife was alive, I separated from him at once. My brother came out to Springfield, and questioned the defendant, but he persisted in his assertion that he was a single man at the time of our marriage. I remained at Springfield for about a year after, and then removed to the State of Indiana, where I resided until my return to Ireland about two years and a half since." No further evidence was given for either side on this point. Counsel for the defendant insisted: First, That the evidence did not prove the commission of any offence against our laws, or any offence of which the Queen's Court could take cognizance; secondly, that there was no sufficient proof of the supposed bigamous marriage; thirdly, that there was no proof that the ceremony alleged to have been performed at Springfield would have been sufficient to constitute a marriage according to the law of the State of Illinois or of the United States, or that the ceremony was in the form prescribed by the law of Illinois or of the United States; Fourthly, that the marriage law of the State of Illinois, or of the United States, if relied on for the prosecution, should have been proved as a matter of fact as in the case of the *Sussex Peerage* (11 Cl. & F. 85) and *Reg. v. Povey* (1 Dears. Cr. Cas. 32); fifthly, there was no proof that the canon law of the Catholic Church, or the common law of England as to marriage, had been adopted in the State of Illinois; sixthly, that the offence, if any, was committed in the State of Illinois and against the law of that

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state, and could not, consistently with international law, be taken cognisance of by any court in this country; seventhly, the words "or elsewhere" in the 24 & 25 Vict. c. 100, s. 57, should be construed to mean or elsewhere within the dominions of the Queen; eighthly, that the inference from the evidence was, that at the time of the supposed bigamous marriage both parties had become domiciled in and were naturalised subjects of the United States of America, and consequently within the proviso of the 24 & 25 Vict. c. 100, s. 57, and they relied on the Naturalisation Act (33 Vict. c. 14). The learned judge declined to rule the points 1, 2, 3, 6, 7, or 8 in favour of the defendant, and left the case to the jury with a recommendation if they believed the evidence of Johanna Barton to find the prisoner guilty. The jury brought in a verdict of "guilty," and the learned judge reserved for this court the question as to whether he should have yielded to the points, Nos. 1, 2, 3, 6, 7, and 8, or if he should have directed a verdict of acquittal.

*Croker Barrington* and *Ferguson*, for the prisoner, relied on *Burt v. Burt* (2 Sw. & Tr. 88), *Reg. v. Fanning* (10 Cox C. C. 411 & 17 Ir. C. L. 289), *The King v. The Inhabitants of Brampton* (10 East, 287), *Graham's case* (2 Lewin C. C. 97). A witness conversant with the American law should have been examined: (*Povey's case*, 1 Dears C. C. 22; *Reg. v. Savage*, 13 Cox C. C. 178.)

*Atkinson* and *Ronan* (*Reg. v. Allen*, L. Rep. 1 C. C. & Res. 368) overrules *Reg. v. Fanning*. See *Reg. v. Brawn* (1 C. & K. 144); *Reg. v. Penson* (5 C. & P. 412). *Our. adv. vult.*

LAWSON, J.—A question has been raised in this case of considerable importance. I proceed to state the grounds upon which I rest my judgment that the conviction should be affirmed. The facts which give rise to the question are few. The defendant Patrick Griffin was married on the 18th day of February, 1871, to Julia Kennedy, in the chapel of Kiltalla, in the county of Kerry, by a Catholic clergyman. No question was raised as to the validity of this marriage. They lived together as husband and wife, and shortly after the marriage he went to America. He resided with his sister at Springfield, in the State of Illinois. There he met Johanna Barton, an Irish woman, a native of Cahirciveen, and, representing himself to be a single man, he proposed marriage to her. She accepted him and they were publicly married in the Catholic Church at Springfield by two Catholic clergymen, who officiated at that church, the banns having been previously called three times in church. The date of this second marriage is not accurately fixed, but it was six or seven years ago, that is, a year or two after the defendant left this country and went to America. The defendant was arrested on the 18th day of December, 1878, at Killonglin, in the county of Kerry, and was tried for this offence at the last assizes for that county. The learned judge told the jury that there was sufficient evidence proper to be considered

by them of the marriage at Springfield with Johanna Barton, upon which the jury might infer that the ceremony then performed was sufficient to constitute a marriage if it had not been for the previous marriage with Johanna Kennedy. The point mainly argued for the prisoner was, that the marriage law of the State of Illinois should have been proved as a matter of fact, and that in the absence of such proof there was no sufficient evidence of the second marriage. It was also argued that the words "not elsewhere" in the 24 & 25 Vict. c. 100, s. 57, must be limited to the Queen's dominions abroad or the colonies, and do not embrace foreign countries. But the words "not elsewhere," in their natural and ordinary signification, apply to all places out of England and Ireland, and the language of the proviso at the close of the section makes the matter plain if it required it, "provided that nothing in this section shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty;" this renders every subject of Her Majesty who is guilty of this offence amenable to the law if he comes within the kingdom. Here both the contracting parties were subjects of Her Majesty. They never appear to have taken any step to divest themselves of their nationality, and the sojourn of the defendant in America was a brief one. There is nothing to show that they ever obtained an American domicile, and both returned to their native land. In my opinion, supposing it to have been necessary to show that his marriage was a valid one according to the law of Illinois, it must be presumed to be so in the absence of evidence to the contrary. The ceremony was publicly performed by the clergymen of the church of which the contracting parties were members, after the publication of banns, and in the most solemn manner; it was a contract *per verba de presenti*, to which the *benedictio sacerdotis*, which was held to be requisite in *Reg. v. Millis* (10 Cl. & F. 534), was added, and was a good marriage at common law. We are not to be supposed to be ignorant of the fact that the Catholic religion prevails over the world, that its priests and places of worship are recognised; and if we find that a ceremony was publicly performed according to the rites of that church, are we to require the presence of an expert to depose that such a marriage is a legal one in the state of Illinois? We should presume in the absence of evidence to the contrary that the clergy were acting according to law, and that they solemnized a valid marriage. I am therefore of opinion that, assuming it to be necessary that this marriage should be shown to be valid according to the laws of Illinois, there was evidence that it was valid, and the instruction of the learned judge to the jury was correct. The authorities sustain this view. The ordinary text-book on evidence (Archbold 884) lays it down thus: "Proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony according to the rites and ceremonies of the

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foreign country would be sufficient presumptive evidence of it, so as to throw on the defendant the onus of infringing its validity; he cites the case of *Rex v. The Inhabitants of Brampton* (10 East., 282, 289), where Lord Ellenborough says, "I think every presumption must be made in favour of its validity according to the law of the country where it was so celebrated, having been performed there in a proper place, and by a person officiating as one competent to perform the function." But I think this case may be rested upon higher grounds, and upon these I wish to base my decision, viz., that it is immaterial what the local law may be, and that if two British subjects in any foreign country go through a form of marriage which the law of this country recognises as binding, one of them having been previously married, the offence of bigamy is committed. We were referred to Story's Conflict of Law and other books to establish what no one doubts—that the law of the foreign country regulates the marriage of all persons domiciled there. It is so, so far as questions of pedigree and legitimacy are concerned. No one doubts this. But to apply the doctrine to the second marriage in a case of bigamy, where the marriage is between two British subjects, involves a confusion of thought. The case of *Reg. v. Allen* (L. Rep. 1 Cr. C. 368) appears to have restored the law to what it was understood to be before the case of *Reg. v. Fanning*, and to have set up the authority of the case of *Reg. v. Brawn* (1 C. & R. 141), where Lord Denman thus lays it down, "It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy." In *Reg. v. Allen*, Chief Justice Cockburn says, "Where a person already bound by an existing marriage goes through a form of marriage known to and recognised by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute by reason of any special circumstances which independently of the bigamous character of the marriage may constitute a legal disability in the particular parties and make the form of marriage resorted to specially inapplicable to their individual case." This case very clearly falls within this rule. Many cases were put in argument which may present difficulties and on which I offer no opinion; but in my judgment, if two British subjects contract a marriage which would be valid if celebrated in their own country, it is immaterial whether that marriage takes place in a country whose laws do not at all recognise that form of marriage as valid, so far as the crime of bigamy is concerned; although of course, in questions of pedigree, the law of the country where the parties are domiciled at the time must determine the validity of the ceremony. Much stress was laid upon the various statutes which enable British subjects to marry abroad at the British embassy and at the house of a consul. Their object was to facilitate the proofs of such marriage, and to remove all questions as to the nation of the parties and their children in a civil court.

They do not in the least clash with the law of England as laid down by Lord Denman, and affirmed unanimously by the Judges of England in *Reg. v. Allen*.

BARRY, J. concurred with Lawson, J.

FITZGERALD, B.—The prisoner in this case was tried and convicted on a charge of bigamy. For the purpose of the case reserved, we must assume that the prisoner's first marriage with a woman shown to be alive at the time of the trial was duly proved. This first marriage was solemnised on the 18th day of February, 1871, at Kiltalla, in the county of Kerry, in Ireland. The only evidence offered of a subsequent (the second) marriage was that of the alleged second wife. In substance the question which we have to decide is whether, having regard to certain objections taken at the trial, her testimony was properly left to the jury as evidence that the prisoner did marry another person within the meaning of the statute 24 & 25 Vict. c. 100, s. 57. The learned judge who tried the case left this evidence to the jury, with a recommendation, if they believed it, to convict the prisoner. We have nothing to do with the question whether the verdict was or was not against the weight of evidence, or whether the judge's intimation of opinion that the weight of evidence was in favour of a conviction was right or wrong. We have only to consider the point of law, that is to say, whether the evidence, having regard to the objections made at the trial on behalf of the prisoner, was rightly left to the jury at all. Upon some of these objections I do not intend to dwell. The second marriage, if there was such, took place in one of the United States of America. On what ground it was objected that such State is not a place elsewhere than in England or Ireland, within the meaning of the statute 24 & 25 Vict. c. 100, s. 57, I am unable to understand. Again, it seems to me clear that by the case stated it was intended that we should understand that both of the parties to this alleged second marriage were by birth subjects of the Queen, and that of each the domicile of birth was Ireland. I should have so thought, independently of the objections, but what was understood at the trial seems plain from the objection numbered 8: "That the inference from the evidence was, that at the time of the supposed bigamous marriage both parties had become domiciled in and were *naturalised subjects* of the United States of America." This is unintelligible, unless it had been ascertained that there was a domicile and allegiance to be changed. Now, I can find no evidence of a change of domicile or allegiance in fact, and much less any facts from which such change would be an inference of law. This is plain as to allegiance. And as to the domicile of the prisoner, which is the only important domicile to be considered, the only evidence is, that he was in Ireland at all events till 1871, that he was again in Ireland in 1878, and as to anything done by him, or as to his locality in the interval, except his residence during the courtship, and for five weeks after the second marriage, there is no evidence at all. As to the second

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marriage there, if there was any, it was a marriage between Irish subjects and the domicile of the supposed husband at the time of the marriage was Ireland. Had the marriage been valid, the result, though not of much consequence in the present case, is, that it would have been as to its incidents, and the rights and liabilities arising from it, an Irish, or what is the same thing, an English, marriage. This is shown by such cases as *Warrender v. Warrender* (2 Cl. & F. 488); *Monro v. Monro* (7 Cl. & F. 842); *Brook v. Brook* (9 H. of L. Cas. 193), and in our own country *Maghee v. M'Allister* (3 Ir. Ch. Rep. 604). The only real objection is that the question of the second marriage ought not to have been left to the jury, because it having been proved to have taken place in one of the United States of America, no evidence was given that it was solemnised conformably with the law of that State, or with the general law of the United States. This objection assumes either that there is a law of the particular State, or of the United States relating to the predicament "marriage," which ought to have been proved by the Crown, or that, if there be not, the Crown ought to have proved that there is not, or finally that, if it is to be assumed that there is not, the prisoner ought to have been acquitted. The courts of justice in this country can take no judicial notice of what the law of a foreign state as to any matter in question is, or indeed that there is any law of such state relating to such matter. I apprehend that they could not. even as to the United States of America, assume (what, however, everybody knows), that the common law of each of the States of the Union, save so far as altered by legislation, is the common law of England. It is certain that the prisoner in the case before us gave no evidence of the law relative to marriage in the particular state, or in the United States. Before I state the evidence relating to the marriage in question in this case I may dispose of one of the foregoing assumptions on which the objection may rest. If in the absence of any evidence on either side as to the existence of any law relating to marriage in the foreign state it was the duty of the Court to assume that there was no such law, it seems to me impossible to conclude that the prisoner ought to have been acquitted. Surely it cannot be said that British subjects in a country in which there is no law relating to marriage are precluded from entering into matrimony, even though they have the means of solemnising it perfectly according to the law of their own country. The objection, therefore, in this case really is, that it lay on the Crown to show either that there was or was not a law of marriage in the foreign state, and, if there was, to show that the second marriage was solemnised conformably with such law. The testimony of the second wife as to the second marriage is this. [His Lordship here read the evidence.] This seems to me clear evidence of a perfectly regular marriage according to the common law of England, and the canon law so far as recognised in England, it wants no element of a

perfect marriage *in facie ecclesiae*. No doubt, however, it was solemnised in the United States of America, and not in England or Ireland, though between British subjects. It is hardly necessary to observe that I am speaking of this marriage wholly without reference to the husband's incapacity to contract. There are two general rules about which as general rules there can be no dispute. English courts will, so far as their mode of procedure will admit, give effect to a contract made abroad if such contract be a valid contract according to the law of the country in which it was in fact made and construe such contract according to the laws of that country. They will not so give effect to a contract made abroad if it be not valid according to the law of the country where it was in fact made. Both rules admit of exceptions into the consideration of which I do not intend to enter. Contracts are either executory or executed. Marriage is a contract; but it is an executed contract, executed in the very making of it creating the relation of husband and wife. In speaking, therefore, of giving effect to it, what is meant is that English courts will enforce the incidents to the rights and liabilities arising out of that relation. In this respect there is the important difference I have already alluded to, between a marriage solemnised abroad between English subjects whose domicile is English and a marriage solemnised between persons whose domicile is foreign. In the one case, the marriage, though solemnized abroad, is an English marriage with the incidents, rights, and liabilities of an English marriage. In the other, a foreign marriage with the incidents, rights, and liabilities of a foreign marriage. But there is to all contracts made abroad (or I should say, may be) a preliminary question; that is to say, whether the contract is valid according to the law of the country where it was in fact made and it is with this question that we have to do here. When the suggestion is made in the Court of any country that matrimony or any other contract which it is considering is invalid according to the law of another country in which it was in fact made, the very raising of the question supposes that both countries accept some common notion of the thing in controversy, otherwise the laws compared would not be laws relating to the same thing. Matrimony or any other contract must, according to the laws of both countries, have something which the laws of both are agreed in regarding as of its essence. Each country may, by positive law, make something else of the essence in that country, and what each country may fix upon for such purpose may be very different. But it is of these matters of positive institution (call them solemnities or what you will, in order to distinguish them from those on which both are agreed in regarding as of the essence), it is of these matters only that you are inquiring when you ask whether the contract is valid according to the law of the country in which it was made. The municipal laws of any country relating to matrimony are laws

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relating to a thing which has an essence independent of those particular laws, though, of course, recognised by the law of that country; and it is only between two countries whose laws recognise matrimony as having such essence, that you can compare the laws relating to matrimony. What is recognised as the essence of matrimony, *ipsum matrimonium*, in this sense by the law of England is the present irrevocable pledging of the service of the person of each of the parties to the contract to the other. I use the word person in a large sense, and when I say irrevocable I mean irrevocable by mutual consent or at the will of either. But the common law of England made of the essence of the contract the presence of a clerk in holy orders when such pledge was made. No marriage made in England therefore was valid which was not so celebrated, and the same was true in Ireland and elsewhere in English dominions where the common law of England prevailed. For these propositions the case of *Reg. v. Millis* (10 Cl. & F. 534) is an authority. This law relating to marriage did not necessarily invalidate a marriage made in a foreign country which, recognising matrimony as having the same essence as that recognised by the English law, had no such municipal law relating to matrimony. No doubt, however, such country might itself have a municipal law relating to matrimony which would, in an English court, invalidate a marriage made in that country, though there was no such law in England. The case of *Reg. v. Millis*, and the case of *Beamish v. Beamish* (9 H. of L. 274), show the ground on which the common law must be considered as making the presence of a clerk in holy orders of the essence of the contract. It was to provide an assurance that in the making of the contract there was that present pledging in which what I may call the natural essence of marriage consists. The presence of the church, for which the presence of the clerk came to be substituted, is and always has been considered full and sufficient evidence that the consent of the parties was duly and sufficiently given. As evidence this belongs to the *lex fori*. But the *lex loci contractûs*, in England made the presence of the clerk of the essence of the contract, in order to dispense as far as might be with litigation as to the nature and sufficiency of the consent actually given. In truth the temporal courts in England had no direct jurisdiction to inquire into the validity of marriages at all, and although marriage was voidable they could not avoid it; this belonged to the court Christian and the common law made that a matter which was, and still continues to be by the *lex fori* full and sufficient evidence of the consent which makes matrimony of the essence of the contract. Such presence of the church or clerk is now no less evidence than it then was of there having been the consent which makes matrimony, and this (as the law of evidence is of the *lex fori*) is equally so as applied to foreign marriages. Where such presence is proved there is sufficient evidence



that the marriage has all that is of the essence of matrimony in all countries which can be considered as having laws relating to matrimony in any sense material to be inquired after, laws, that is to say, relating to matrimony recognised as having such essence. In this case, as to the second marriage in the United States, there is sufficient evidence of a marriage having all that is of the essence of matrimony in any country which can have laws relating to matrimony in any sense material to be inquired after. And the question is whether a party proving a marriage which has all that is of the essence of marriage according to all laws, material to be considered, is bound further to show that there is no law of the country where it was made which invalidated it. No doubt there may be such a municipal law, as there was in England. I can find no authority whatever for any such proposition, either as regards matrimony or any other contract. There is no authority for the proposition that a party relying on a contract, be it matrimony or any other contract, if he shows that the *factum* has what I may call the natural essence of a contract of the kind in question, is bound to show in the first instance when that contract is made in a foreign country that the foreign country has a law relating to contracts of the kind, or that it is conformable to such law. It may be, and it often is, necessary or convenient that he should show in the first instance what the foreign law is. It may be necessary if the construction of the language used would be different by the foreign law from what it is in England, or where any other effect which he seeks to give to the contract is different from the effect which would be given to it in England. It may be convenient because proof of its conformity to the foreign law may be the easiest way of proving that it has what is of the essence of the contract. But if proper evidence be given that it has what is of the essence of the contract it will be presumed to be according to the foreign law (if any such there be) without any evidence of such foreign law until the contrary is shown. In every case of marriage the presence of a clerk in holy orders is evidence that the contract has what is of its natural essence, and therefore, though the marriage be in a foreign country, if such presence be proved a foreign law invalidating the marriage must be shown by him who impeaches it. But the cases go much further. A marriage, or any other contract, may be held valid if made in a foreign country though invalid according to the law of England, and that without proof of foreign law. For this the case of *Rex v. Inhabitants of Brampton* (10 Exch. 282) is in the case of matrimony a distinct authority. That case was much misunderstood I think in the argument. There was a marriage had abroad, and there certainly was no evidence of any foreign law whatever relating to marriage, the objection was the same as that made here, that there was no evidence of the foreign law. It would not have been necessary if the parties carried the law of England with them, and the marriage was according to the

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law of England by a priest in holy orders. Both these matters appeared to be doubtful, according to the opinion of some at least of the judges, and principally whether there was sufficient evidence of the presence of a priest in holy orders. But all agreed that there was evidence, according to the law of England, of a marriage from which a contract *per verba de presenti* might be presumed; and it was decided that the foreign law need not be proved, but that the marriage should be presumed conformable to it, if any such there was. The case of *Male v. Roberts* (3 Esp. 163), before Lord Eldon, when Chief Justice of the Common Pleas, is a strong instance in a contract of another kind. That was an action for money paid to the use of the defendant in Scotland. It appeared that the defendant was an infant, and the payment was not for necessities; it would have been void, therefore, by the laws of England. It was insisted that it could not be presumed that the laws of the two countries were different, and that if they were the plaintiff was bound to show it. Lord Eldon says, "What the law of Scotland is with respect to the right of recovering against an infant for necessities, I cannot say. But if the law of Scotland is that such a contract as the present could not be enforced against an infant, that should have been given in evidence and I hold myself not warranted in saying that such a contract is void by the law of Scotland because it is void by the law of England. The law of the country where the contract arose must govern the contract, and what that law is should be given in evidence to me as a fact. No such evidence has been given, and I cannot take the fact of what that law is without evidence. It was not of the essence of the contract in that case that the promisor should be adult, though the municipal law in England makes it so in some cases; and no presumption was made that the law of Scotland was the same, though no evidence of the law being otherwise was given by the plaintiff. In truth, the general rule is that if a contract made in a foreign country be propounded against any party to it, if the liability of the defendant differs from his liability in this country, he must show it. So the law is stated by Lord Tenterden in the case of *Brown v. Gracey* (D. & R. N. P. C. 41) in the note. This was not a case of marriage, but the case in a note to which it is found was, that is the case of *Lacon v. Higgins* (D. & R. N. P. C. 39), which is also reported in 3 Stark. 178. That was an action for goods sold and delivered against a woman to which there was a plea of coverture; there was a question as to the right to begin. Lord Tenterden, then Chief Justice Abbott, said that, as the plaintiff had to prove the amount of damage, he was entitled, if he thought proper, to begin, but that if he did he must go into his whole case as to coverture. The Counsel for the defendant then admitted the amount claimed and began. He proved a marriage between the parties, at Versailles, by a Protestant priest, and cohabitation; and the plaintiff, who impeached the marriage, was then put on his case and succeeded by proof of the French law in showing

that the marriage was invalid. The law is put the same as to the effect of a contract; effect will be given to it according to the English law, though made in a foreign country, unless there be proof that the foreign law gives it a different effect. Of this the case of *Freemantell v. Dedire* (1 P. W. 241) is an instance. Effect was there given to a contract made in Holland, and to parties insisting that effect should be given to it in certain respects in which that law differed from the law of England it was answered that this could not be done without proof of the law, but the contract was given effect to without proof of the law. In my opinion in the present case by proper legal evidence, a marriage having all that is of the material essence of marriage has been proved in the United States of America, and we cannot presume without proof that it is invalidated by any American law. The case of *Reg. v. Allen* (1 L. Rep. Crim. Cas. Res. 367) was frequently referred to in the argument on both sides; it seems to me to have nothing to do with the case before us. The use made of it by the counsel for the Crown seemed to be as an authority that any form of marriage not fantastic would be a sufficient second marriage on a charge of bigamy. I think it is enough to say that this is a mere caricature of the case. The argument of the counsel for the defendant I understood to be this, that inasmuch as what makes the second marriage in bigamy is not its being a valid marriage, on the supposition that both parties are free to marry, but its conformity to the outward solemnities required by law, the only way in which what those solemnities consisted in case of a foreign marriage can be known is the proof of the foreign law. It is true that the case of *Reg. v. Allen* lays down, contrary to the case of *Reg. v. Fanning* in this country, that it is not necessary that the second marriage in bigamy be shown to be a marriage that would have been valid but for the prior marriage of the party charged. But it is quite certain that *Reg. v. Allen* did not decide that the second marriage, if proved to be a marriage that would have been valid but for the previous contract, is not a second marriage in bigamy. Now that is what is proved in the present case; it satisfies both authorities: (*Reg. v. Allen* and *Reg. v. Fanning*.) I think the conviction ought to be affirmed.

PALLES, C.B. concurred with FITZGERALD, B.

MAY, C.J.—I apprehend that it is an undeniable rule of law that the sufficiency and validity of any ceremony to constitute marriage between persons performing such ceremony depends on the law of the place where it has been performed. Certain marriages celebrated between British subjects in the house or chapel of a British ambassador or within a British factory, or within the lines of British troops, are declared valid by the Act of 4 Geo. 4, c. 91. But save as to such marriages, the validity of a marriage celebrated between British subjects in a foreign country must be determined by the law of that country, not by the law of England. And I think it is also clear beyond doubt that if the validity of a marriage celebrated in a foreign country comes in

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question in a British court of justice, the foreign law governing the marriage must be proved as a fact by proper testimony on oath before the adjudicating tribunal. I also think it clear that in a case of bigamy, at least the second marriage, which constitutes the offence must be proved as a fact, and cannot be inferred or presumed from cohabitation of the parties or otherwise; and from these propositions it would appear to me to follow, as a legitimate consequence, that in the present case, in order to establish that the ceremony deposed to by the witness Johanna Barton was sufficient to establish a marriage between herself and the prisoner, some evidence should have been given as to the law of Illinois on the subject of marriage by a witness competent to depose on that subject. This point appears to me to have been so decided in two cases which have been referred to. In *Reg. v. Povey* (22 L. J., Mag. Cas. 21) the sister of the second wife proved the second marriage was performed in Scotland, by a minister of a congregation, in the private house of the witness. That the witness herself was married in the same way and that persons always married in Scotland in private houses. That the prisoner lived together after this ceremony as man and wife for a few days and then left for England. Jervis, C.J. says, "We are all clearly of opinion that some witness ought to have been called conversant with the law of Scotland as to marriages." Alderson, B. says, "Reading this case we cannot tell what the law of Scotland is, and unless we know the Scotch law we cannot say whether these persons were lawfully married." In *Burt v. Burt* (29 L. J., P. M. & D. 133) precisely the same point was determined. There Jane Wilson the second wife proved that she was married to the prisoner, in Australia, according to the rites of the Kirk of Scotland. That she had lived nine years in Melbourne and had known several persons married in the same way, who afterwards lived together as man and wife. No evidence was given as to the law of Australia with respect to the validity of such a marriage. The Court, consisting of Cresswell, J., Martin, B., and Willes, J. said, in order to establish bigamy you must prove such a marriage as but for the former marriage would have been in itself valid. Supposing the marriage had been with a woman who had a husband living at the time, you have failed to establish that by the law of Australia the ceremony that was gone through would have constituted a good marriage, and you have not therefore made out the allegation of bigamy. It is said that in this case the marriage was celebrated in a Roman Catholic Church, and by a Roman Catholic priest, and it is to be presumed that such marriage was valid. But I apprehend the question is not one of presumption or inference, but of actual proof by oral evidence taken on oath, such a marriage may or may not be valid according to the canon law, or according to the common law of this country. The court is, in my opinion, entirely without information as to the requirements of the law of Illinois on the subject of marriage, and not in a position to

decide that this marriage was valid according to that law. Whether an explicit admission by the defendant of the validity of his second marriage would supply the place of regular proof, it is not, I think, necessary to consider, as I find no evidence of any such admission. My brother O'Brien concurs with my judgment, but the majority of the court being of a contrary opinion, the conviction stands confirmed.

O'BRIEN, J. concurred with the Chief Justice.

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*Conviction affirmed.*

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### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

*June 6 and July 5, 1879.*

(Before MAY, C.J., and O'BRIEN, J.)

JACOB v. LAWRENCE. (a)

*Libel contained in letter to plaintiff's solicitor—Extent of privilege  
—Reply to demand for apology in an action for slander.*

*Where a defendant wrote to a plaintiff's solicitor in an action of slander, in reply to a demand for an apology contained in a letter from the plaintiff's solicitor, and informed the plaintiff's solicitor of the alleged dishonourable conduct of the plaintiff which caused the defendant to speak the words, and warned the solicitor to look after his costs, as a person guilty of such dishonourable conduct as the plaintiff had been to the defendant could not be trusted: it was*

*Held, on demurrer, that the communication was privileged, and that the warning was a deduction from the subject-matter of the privileged communication, and that it was the province of a jury and not of the Court to say whether this deduction was an excess of the privilege.*

**A**CTION for slander and libel.

The statement of claim alleged that the plaintiff was a wholesale jeweller and agent in Ireland for Hart and Sons, and the

(a) Reported by CECIL R. ROOPE, Esq., Barrister-at-Law.

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defendant “falsely and maliciously spoke and published of the plaintiff in relation to his said business of traveller, and the carrying on and conducting thereof by him, the words following; that is to say, “Mr. Hart,” meaning one of the firm of Hart and Sons, “you have a damned thief of a traveller,” meaning the plaintiff, “in your employ.” The plaintiff instructed a solicitor to take proper steps to obtain redress. The plaintiff’s solicitor wrote a letter to the defendant demanding an apology, and threatening an action in the event of non-compliance with this demand. In reply the defendant wrote the libel complained of to the plaintiff’s solicitor. “I,” meaning the defendant, “quite understand Mr. Jacob’s authorising you to write to me, as of course he must, for his own credit sake, show to his friends that he had placed the matter in the hands of a solicitor. I do not retract one single word I publicly expressed, and I beg of you to inform your client that I shall, at every hotel or other place I might meet him, request payment of the 6*l.* which I lent him to save him from the public insults he was exposed to by Mr. Samuels (who evidently knew him better than I did), and should he not pay me I shall again publicly expose him. And now, sir, mark my words, this man Jacob knows there are so many can substantiate what I have stated that he will not dare to stand in a witness box to deny the accusations I have made. I should suggest to you the advisability of looking after your costs, as a man guilty of such baseness as he has been to me in repudiating this debt cannot be trusted.”

To this the defendant pleaded in paragraph 5 of his defence as follows: “Upwards of a year before the writing and publishing of the words alleged the defendant met the plaintiff at an hotel in Manchester, and the defendant then lent to the plaintiff a sum of 6*l.*, which the plaintiff promised to repay to defendant on the following day, and the defendant, on the following day, applied to the plaintiff for the repayment of the said sum, but the plaintiff then made an excuse to the defendant for not then repaying him the said sum, and promised to remit the same to defendant in the course of a few days; but notwithstanding his said promise the plaintiff did not remit the said sum, or any part thereof, to the defendant, and after the lapse of some months the defendant wrote to the plaintiff requiring repayment of the said sum, but the plaintiff did not reply to or take any notice of the defendant’s said application, and afterwards the defendant met the plaintiff in an hotel in Dublin, and again demanded from him the repayment of the said sum, and the plaintiff at first denied he owed the defendant any sum, and then untruly alleged that he had sent the said sum to a friend of the defendant’s for the defendant, and used violent and abusive language towards the defendant, and imputed to him dishonest and dishonourable conduct, and in consequence of the said conduct of the plaintiff the defendant truly expressed his indignation at the plaintiff’s conduct, and condemned the said conduct as, in his opinion, dishonourable

and ungentleman-like, and afterwards and before the writing and publishing of the said words the defendant received from the plaintiff's solicitor a letter demanding from the defendant an ample apology and retraction of the language used by the defendant to the plaintiff at the said hotel hereinbefore mentioned, and threatening proceedings against the defendant in case of his refusal, and thereupon the defendant wrote to the plaintiff's said solicitor the words mentioned for the purpose and with the object of preventing the said solicitor from instituting the said threatened proceedings, and for the purpose of affording to the said solicitor the defendant's belief as to the plaintiff's conduct and dealings in pecuniary transactions, and as to his not being likely to discharge just debts or obligations, and the defendant wrote and published the said words *bona fide* and without malice, and believing the same to be true."

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To this portion of the defence the plaintiff demurred.

*Carton*, Q.C., with him *Houston*, for the plaintiff in support of the demurrer.—Even assuming that the occasion on which the words were written was a privileged one, the defendant cannot rely on the privilege by reason of the excess: (*Fryer v. Kinnersley*, 15 C. B., N. S. 422; *Warren v. Warren*, 1 C. M. & R. 250; *Ede v. Scott*, 7 Ir. C. L. 607; *Tuson v. Evans*, 12 Ad. & El. 733.) The principle laid down in these cases is not overruled by *Cooke v. Wildes* (5 El. & Bl. 328).

*Purcell*, Q.C., with him *Gerrard*, for the defendant, *contra*.—The occasion rebuts the *prima facie* inference of malice: (*Wright v. Woodgate*, 2 C. M. & R. 573; *O'Donohue v. Hussey*, Ir. Rep. 5, C. L. 124.) It is a matter exclusively for the consideration of the jury: (*Wallace v. Carroll*, 11 Ir. C. L. R. 485; *Dwyer v. Esmonde*, L. R. Ir. 2, C. L. 243; *Ruckley v. Kiernan*, 7 Ir. C. L. 75.)  
*Our. adv. vult.*

MAY, C.J.—The law upon the subject of privileged communication in actions for defamation appears to be reduced to the following rules: "If a person be proved to have used defamatory expressions concerning another, *prima facie* the law imputes malice to and imposes responsibility upon him. But in case these expressions have been made use of upon certain occasions called privileged, *prima facie* the inference of malice is rebutted and responsibility is avoided. But even though the occasion may be of a privileged character, the person using such language may lose the benefit of the privilege and incur responsibility. If the tribunal before whom his conduct comes in question is satisfied that in the defamatory expressions he made he exceeded the proper requirements of the occasion, using language of uncalled-for violence, thereby showing that he was actuated by feelings not accounted for by the exigencies of the occasion and used the language not *bonâ fide* to serve the purposes of such occasion but *malâ fide* and in order to injure the complainant, the different provinces of the court and jury in



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cases of this kind are clearly defined. It is the province of the court to determine whether the occasion on which the language was made use of afforded privilege; on the other hand the cases of *Hussey v. Donohue* (Ir. Rep. 5 C. L. 124) confirmed and followed in the case of *Dwyer v. Esmond* (Ir. Rep. 11 C. L. 243) has established that it is the province of the jury, not of the Court, to determine whether the language used exceeded the proper limits of the privilege which that occasion afforded. Now, in the present case, the defendant received a letter from the plaintiff's attorney which is referred to in the pleadings and was produced during the argument, and which was as follows: "19th Feb. 1879.—Sir,—I am instructed by Mr. Alfred Jacob to take legal proceedings against you for slander, and for an unwarrantable defamation of his character. If I shall in the course of to-morrow receive from you an ample written apology and retraction such as will satisfy Mr. Jacob's honour, and such as he can show his friends, and to the large company present at the time these slanders were uttered, I shall advise him to be satisfied; otherwise I shall commence legal proceedings without any further notice.—Your obedient servant, J. D. Rosenthal." The defendant being thus accused of unwarrantable defamation of the plaintiff, and threatened with immediate law proceedings, was clearly justified in writing a reply to the attorney of the plaintiff to explain and justify his conduct, and also to show reasons which might dissuade the adverse attorney from taking the hostile step which was menaced. His letter to Mr. Rosenthal in reply to that gentleman's communication constitutes the libel complained of. Under these circumstances, I think the occasion was clearly privileged. The defendant was absolutely called upon to answer the letter and the charges it contained, and in answering it he was warranted in making statements tending to show that the language he had made use of concerning the plaintiff was not unwarrantable, as alleged, but justified by the plaintiff's conduct. He was entitled to state what that conduct had been and to comment upon it. In fact it was hardly disputed by the plaintiff that the occasion in this case was privileged. His contention rather was that the contents of the letter of themselves demonstrated that the defendant had exceeded his privilege. His counsel further contended that, though as a general rule the question of excess is to be determined by a jury, such rule does not apply where the document constituting the libel contains defamatory matter not relevant or pertinent to the matter in hand. The privilege, it was argued, which the occasion affords cannot extend to protect imputations or allegations disconnected with that occasion. Now, if the Court could clearly see upon the face of the impeached document that the defendant has made use of his so-called privilege, not as a protection and defence but as an opportunity for making an attack upon the character of the complainant, including subjects foreign to the purposes and objects of the privilege, it would

probably be in a position to determine that the defence of privilege failed, and the writing and publication being admitted, might itself give judgment against the defendant. But it appears to me that the document constituting the alleged libel in the present case is not open to the imputation of introducing defamatory matter foreign to the occasion. The passage principally complained of by the plaintiff was the passage with which the letter concluded: "I should suggest to you the advisability of looking after your costs, as a man guilty of such baseness as he has been to me in repudiating this debt cannot be trusted." This clause in the letter, it has been contended, alleges general dishonesty and untrustworthiness in the plaintiff, and is not confined to the matters in dispute. But it appears to me that this passage is not open to this objection. The baseness alleged is most strictly confined to the conduct of the plaintiff towards the defendant in repudiating the debt he owed him. The defendant draws the inference that it is possible or probable that, if the plaintiff has refused to pay him a debt of a delicate and honourable character, he may also refuse to pay the attorney a debt of an inferior and more commercial description. This is not to attach a further and different blot on his character. It is a mere inference and deduction from what has gone before, and moreover it appears that this suggestion is made in order to cause hesitation and caution in the mind of Mr. Rosenthal as to the prudence on his part of embarking in the menaced litigation. The tendency of the passage would appear to have been dissuasive and self-protective, not aggressive, inculpatory, or malignant. In my opinion the question whether this sentence, and indeed the whole of this letter, is or is not within the privilege possessed by the defendant, consistently with the rule established by the authorities, is a question of mere excess, and should be determined by a jury, not by the Court. I therefore think the demurrer should be overruled.

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*Demurrer overruled.*

## NORTHERN CIRCUIT.

## CARLISLE SUMMER ASSIZES.

*Monday, July 7, 1879.*

(Before Mr. Justice BOWEN.)

REG. v. GOODFELLOW. (a)

*Evidence—Depositions—Illness of witness.*

*Pregnancy alone may be ground for the admission of a deposition.*

THE prisoner was indicted for the wilful murder of her illegitimate female child, at Wetherall, on or about the 13th day of April, 1879.

*Hon. A. D. Elliot* for the prosecution.

*Shee* for prisoner.

*Hon. A. D. Elliot* applied to the Court for permission to read the deposition of a witness, who was pregnant, before the grand jury quoting *Reg. v. Wellings* (L. Rep. 3 Q. B. Div. 426) in support of his application.

A medical man gave evidence to the effect that he had examined the witness that morning; she was very near her confinement, and it would have been dangerous to expose her to the excitement of attending a criminal trial. That two days previously there were symptoms of approaching labour and her confinement might take place at any moment. At the same time he could not say that her case differed in any way from any ordinary case of confinement.

BOWEN, J. (after consulting with Lush, J.) admitted the deposition.

The prisoner was acquitted of the graver charge, but was found guilty of concealment of birth.

(a) Reported by E. T. BALDWIN, Esq., Barrister-at-Law.

## WESTERN CIRCUIT.

EXETER.

Saturday, July 19, 1879.

(Before Mr. Justice LOPES.)

REG. v. TWOSE. (a)

*Criminality—Mens rea.*

*The belief, although erroneous, of prisoner in the existence of a right to do the act complained of excludes criminality.*

**PRISONER** was indicted for having set fire to some furze growing on a common at Culmstock.

*C. W. Matthews* prosecuted.

*Bullen* defended.

It appeared from the evidence that persons living near the common had occasionally burnt the furze to improve the growth of the grass, although the existence of any right to do this was denied.

But the prisoner in this case denied having set the furze on fire at all.

*Bullen*, for the defence, contended that, even if it were proved that the prisoner set the furze on fire, she could not be found guilty if it appeared that she *bonâ fide* believed she had a right to do so, whether the right were a good one or not.

LOPES, J.—If she set fire to the furze thinking she had a right to do so, that would not be a criminal offence. I shall leave two questions to the jury—1. Did she set fire to the furze? 2. If yes, did she do it wilfully and maliciously?

(a) Reported by H. T. TAMPLIN, Esq., Barrister-at-Law.

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## WESTERN CIRCUIT.

EXETER.

*Saturday, July 19, 1879.*

(Before Mr. Justice LOPES.)

REG. v. FRENCH. (a)

*Murder—Manslaughter.*

*On an indictment for murder the power of the jury to return a verdict of manslaughter for criminal negligence by the accused depends upon the circumstances of the particular case.*

**P**RISONER was indicted for the wilful murder of her illegitimate child.

*Pitt-Lewis* prosecuted.

*Henry Clark* defended.

The prisoner had delivered herself of the child, the subject of the charge, which was in such a condition from injuries received during, or immediately after, its birth that it only survived an hour or two.

*Pitt-Lewis*, in opening the case to the jury, observed that they might find the prisoner guilty of murder; or, if they negatived the charge of murder, of manslaughter, as the prisoner had neglected to provide medical assistance in her confinement and had thus caused the death of the child. Some learned judges had held such neglect to be manslaughter, while others had been of a different opinion.

LOPES, J.—There can be no general ruling as to criminal negligence. In one case there might be a question for the jury of criminal negligence; each case must depend upon its own circumstances.

At the close of the case for the prosecution the learned judge ruled that the evidence disclosed nothing on which a verdict of manslaughter could be returned. The prisoner must be found guilty of murder or nothing.

(a) Reported by H. T. TAMPLIN, Esq., Barrister-at-Law.

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## HIGH COURT OF JUSTICE.

## EXCHEQUER DIVISION.

Nov. 5, and 15, 1878 ; and Feb. 17, 1879.

(Before PALLES, C.B., FITZGERALD and DOWSE, BB.)

BOURKE v. MEALY. (a)

*Illegal consideration—Action upon bill of exchange—Allegation of perjury—Probable cause—Criminal proceedings stifled—Taint of illegality.*

*In an action by drawer against acceptor upon a bill of exchange the defence alleged that the bill sued upon had been accepted by the defendant in consideration of the plaintiff abandoning certain civil bill proceedings pending at the time of the acceptance against Mrs. S. for the recovery of a previous bill, in which the plaintiff asserted that Mrs. S. had forged her husband's name, and forbearing to proceed with criminal proceedings which the plaintiff had threatened to institute on the ground of the alleged forgery :*

*Held (on demurrer), that the defence was bad, on the ground that the forbearing to proceed with the criminal proceedings was not illegal, inasmuch as no criminal proceedings had actually been commenced, nor was there any reasonable or probable cause for believing a criminal act to have been committed ; that therefore this portion of the alleged consideration was simply nugatory, not illegal ; and this being so, that the abandonment of the civil proceedings formed a valid and sufficient consideration for the acceptance of the bill.*

**D**EMURRER to amend defence in an action on a bill of exchange, of which the plaintiff was drawer and the defendant acceptor.

The case had gone to trial on a defence which was then allowed to be amended, with leave to the plaintiff to demur. The defence demurred to alleged that the plaintiff had taken proceedings in the County Court against one Patrick Shortall for the amount of a bill of which the plaintiff was drawer and Shortall the alleged

(a) Reported by J. GORDON McCULLAGH, Esq., Barrister-at-Law.



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acceptor, which bill had been passed to the plaintiff by the wife of Shortall, in satisfaction of a debt due by her to the plaintiff before her marriage; that this bill was alleged to be a forgery; that the plaintiff threatened to institute criminal proceedings against Mrs. Shortall for having forged the bill; and that thereupon, in consideration of the plaintiff abandoning the civil bill action and forbearing to proceed with the criminal proceedings, and abandoning the said prosecution, and in order to prevent the scandal which would result to Mrs. Shortall and her family if such prosecution were proceeded with, the defendant at the request of the plaintiff and Mrs. Shortall accepted the bill sued on.

At the trial the evidence given was to the effect that Mrs. Shortall, previous to her marriage with Patrick Shortall, was indebted to the plaintiff; that after her marriage, on being pressed by the plaintiff to procure her husband's acceptance of a bill for 50*l.*, in the absence of her husband, she got her son, twelve years of age, to indorse Patrick Shortall's name on the bill; that the plaintiff had admitted that he knew the signature on the bill to be not that of Shortall; that the plaintiff commenced civil bill proceedings in the County Court against Shortall to recover the amount of the bill; that these proceedings were dismissed without prejudice, owing to the absence of a material witness; that subsequently further proceedings were commenced, and that the plaintiff threatened to prosecute Mrs. Shortall and her son for forgery unless the defendant, who was uncle of Patrick Shortall, would accept a bill for 50*l.*; and that the defendant thereupon, and to save scandal, agreed to accept the bill sued upon. Upon this evidence a verdict was taken and judgment entered for the plaintiff, with leave reserved to the defendant to move to have the judgment changed into one for him.

The demurrer to the amended defence now came on for argument, and at the same time an application on behalf of the defendant was heard to enter judgment for him pursuant to leave reserved, or for a new trial.

*James Murphy, Q.C.* and *Blunden* for the plaintiff in support of the demurrer.—There is a double consideration for the bill sued upon stated in this defence—an abandonment of the civil bill proceedings already instituted on the former bill alleged to have been forged, and forbearance to institute criminal proceedings threatened, but not begun, against Mrs. Shortall and her son. No doubt, if the latter portion of the consideration be an illegality, the whole is tainted with illegality, and cannot be sustained; but this portion is not an illegality, but a mere nullity. In all the cases in which it has been held that a contract has been tainted with illegality on account of the consideration, or part of the consideration, for it having been the abandoning of criminal proceedings, the criminal proceedings had been actually commenced, and an agreement had been come to to stop them, or at least there had been reasonable grounds for believing that a crime had been committed. In this case it had always been denied, and never

attempted to be proved, that any such crime as forgery had been committed; and the evidence goes to show that the plaintiff was well aware that it was not a forgery. The words of Tindal, C.J. in *Ward v. Lloyd* (6 M. & G. 785) are exactly applicable here: "This is not the case of a security given to induce an uninterested party to withhold a charge of a criminal nature; there is a just debt due from the defendant to the plaintiff." The result of the cases bearing upon the subject is that, in order to sustain such a defence as we have here, the public must be shown to have had an interest in the felony condoned, and not that it was the avoidance of scandal which prompted the compromise.

*Heron*, Q.C. and *Lyster* for the defendant.—The prosecution need not have been commenced to render the contract invalid: (*Williams v. Bayley*, L. Rep. 1 H. of L. Cas. 200; 14 L. J. 802.) In *Ex parte Critchley* (3 Dowl. & L. 527) it was held to be enough to invalidate an agreement that it was calculated to bring a charge of a criminal nature to an end. The distinction between proceedings actually commenced and those only threatened seems only to be that in the latter case an actual agreement not to prosecute is necessary to invalidate an obligation founded on the forbearance to proceed, but in the former no actual agreement need be proved: (*Pool v. Bousfield*, 1 Camp. 55; *Osbaldiston v. Simpson*, 13 Sim. 513; *Kirwan v. Goodman*, 9 Dowl. 330; *Kier v. Leeman*, 6 Q. B. 308; affirmed 9 Q. B. 371; and Notes to *Collins v. Blantern*, 1 Sm. L. C. 371.) We submit, moreover, that the plaintiff should not now be allowed to say that he wantonly made the charge of forgery of the bill, but that the fact of his having threatened criminal proceedings should be taken as involving probable cause for the threat. Lastly, a contract not to give evidence is undeniably illegal, but here the agreement not to prosecute must include a stipulation not to give evidence on the prosecution for forgery.

The judgment of the Court (Palles, C.B. and Fitzgerald and Dowse, BB.) was delivered by PALLES, C.B.—This case, which was argued at the end of the last sittings, comes before us upon a demurrer to the defence, and also upon an application for a new trial. The action was upon a bill of exchange by drawer against acceptor. The defence, as amended at the trial, stated that the plaintiff had proceeded in the Civil Bill Court of Kilkenny against one Patrick Shortall to recover the amount of another bill of exchange, drawn by the plaintiff upon, and alleged to have been accepted by, Patrick Shortall, in satisfaction of a debt alleged to be owing from Mrs. Shortall to the plaintiff previous to her marriage. The defence then stated that the bill was alleged to be a forgery, that the plaintiff threatened to institute criminal proceedings against Mrs. Shortall for having forged the bill, and that thereupon, in consideration of the plaintiff abandoning the civil bill action, and forbearing to proceed with the criminal proceedings, and abandoning the third prosecution, and in order to prevent the scandal which would

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result to Mrs. Shortall and her family if such prosecution were proceeded with, the defendant, at the request of the plaintiff and Mrs. Shortall, accepted the bill sued on. To this defence the plaintiff has demurred. It is to be observed, in the first place, that as the defence states two considerations—one the abandoning of a civil bill action, and the other the forbearing to proceed with criminal proceedings—it cannot be sustained as showing a failure of consideration, if we were of opinion that the forbearing to proceed with criminal proceedings was an insufficient or nugatory consideration. Even on this assumption there would remain the abandonment of the civil action as admittedly sufficient consideration to sustain a promise. The question then is, does the defence show that the portion of the consideration which is stated to be “forbearing to proceed with the criminal proceedings, and abandoning the said prosecution,” is illegal? The defence does not state that the former bill was a forgery, nor does it allege any reasonable grounds to induce either the plaintiff or the defendant to believe that it was such. It does not even state, in general terms, that such reasonable grounds existed, nor that either the plaintiff, or Patrick Shortall, or the defendant, believed the bill to be forged. It even omits to state by whom the allegation of forgery was made. Again, it shows that the prosecution referred to in the plea was never in fact instituted, and therefore the words “abandoning such prosecution” must be read as “not instituting a prosecution.” The question thus raised is whether the abstaining, or contracting to abstain, from instituting criminal proceedings in respect of a crime alleged to have been committed, and for which a criminal prosecution has been threatened, is illegal, although it does not appear that the crime was in fact committed, and there are no reasonable grounds for believing that it was, and to determine whether such a contract is illegal or not we must first ascertain the duty, if any, due by this contracting party to the public. Now, in the first place, I desire, in consequence of some of the arguments which have been addressed to us, to distinguish from each other two separate grounds of defence—first, illegality; secondly, extortion or duress. If any part of the consideration be illegal the contract is incapable of being made the foundation of an action, irrespective of the extent to which that part of the consideration may have influenced the mind of the promisor. If, on the other hand, the part in question of the consideration be not illegal, but simply nugatory, or insufficient in itself to support a promise, than the fact of its being alleged to be part of the consideration will not, *per se*, invalidate the contract, provided the other part of the consideration be sufficient in law. Still, if this nugatory consideration were the principal inducement of the promisor, the circumstance may with others, such as pressure, be relied upon in proof of a plea of extortion or duress. But such a defence is in no sense a plea of illegality.

The gist of it is (that which in a plea of illegality is immaterial) the effect produced upon the mind of the promisor by the circumstances relied on. The plea here relies not upon pressure, but upon illegality. In my opinion the principle upon which contracts of this description are held to be illegal is, that a prosecution is a proceeding not for the benefit of individuals, but of the public; that the only interest in it which the law recognises is that of the public, and that no one can be permitted to barter for money that in which the public alone are interested. It was on this ground that the principle applicable to stopping prosecutions was applied to the withdrawal of an election petition in *Coppock v. Bower* (4 M. & W. 361). It was for this reason also that in *Kier v. Leeman* (6 Q. B. 308; affirmed in error, 9 Q. B. 371), and several other cases mentioned in giving judgment there, it was determined that a prosecution for an offence not of a public nature might be lawfully compromised. To determine, then, whether any agreement of this nature is or is not illegal, we must first ascertain whether the public have an interest in the inquiry which it is agreed shall not be instituted or carried on. The public have an interest in every guilty person being brought to justice; and therefore in every case in which an offence of a public nature has been in fact committed, an agreement to abstain from instituting a prosecution in respect of it, or to forbear proceeding with a prosecution already instituted, is illegal. *Collins v. Blantern* (1 Sm. L. C. 325), *Osbaldiston v. Simpson* (13 Sim. 513), and *Williams v. Bayley* (L. Rep. 1 H. of L. Cas. 200; 14 L. J. 808) were cases of this description. When I say "every case in which a crime has been in fact committed," I do not mean that in every case strict proof, such as would justify a jury in finding the accused person guilty, must be given. In many cases the acts and conduct of the parties to the agreement may be such as to induce the jury to believe that each of them acted upon the assumption that a crime had been in fact committed; and in such a case, upon a question of the nature of the agreement, I should be prepared to hold that both parties were estopped from alleging the contrary of that which was its basis. When, although it be uncertain whether any offence of a public character has or has not been committed, there are reasonable grounds for believing that it has been, the question becomes more difficult. It is unnecessary for the purposes of the present case to decide it; but for myself I see no reason to doubt the soundness of the opinion of Coltman, J. in *Ward v. Lloyd* (6 M. & Sel. 785) that an agreement to abstain from prosecution under such circumstances would be illegal. But in such a case I conceive the public have an interest that the truth should be ascertained and the accused party, if guilty, brought to justice. It is this interest which in the case put (i.e., where there is a reasonable and probable cause) affords a defence to an action for the prosecution, irrespective of the motives of the prosecution.

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There is another class of cases in which the public have obtained an interest in the inquiry, and this irrespective of the actual commission of a crime. I mean where a prosecution has in fact been instituted. In such a case, when the criminal law has been set in motion, a duty is due to the State that nothing shall be done to interfere with the due course of such prosecution, and the public have an interest that it shall be brought to a conclusion in due course of law. When therefore a prosecution has been commenced, a contract to terminate it, or, in the language of the old cases, to stifle it, is illegal, and this irrespective of a crime having been committed, or of the reasonable and probable cause of the guilt of the person charged. Such were the contracts in *Kirwan v. Goodman* (9 Dowl. 330), *Fivaz v. Nichols* (26 C. B. 501), and *Kier v. Leeman* (6 Q. B. 308; affirmed 9 Q. B. 371). But passing from these cases, none of which apply here, and to which I have referred merely for the purpose of explaining the grounds of my decision, let me come to the question immediately before us. No prosecution had in fact been instituted; therefore there is no question of stifling or stopping a prosecution. No crime had been committed; no one believed that a crime had been committed; no reasonable grounds were present to the mind of anyone, or in fact existed, which could form a foundation for such a belief. There is nothing more than an allegation of forgery made, I will assume, to the holder of the bill, but made by whom, whether by a stranger, by one interested, or by a person with knowledge or without knowledge, supported or unsupported by facts, is uncertain. In such a case the public have no interest in the truth of the allegation being ascertained. It is because the public have no such interest that a prosecution without reasonable or probable cause may be made the subject of an action, if the motive of the prosecutor be an indirect one. Neither can the threat of the plaintiff, *per se*, create a public interest in the matter. This is, in my opinion, demonstrated, that where the debt arises out of a criminal act of the debtor, the civil remedy is suspended only, and that till public justice has been satisfied: (*Bromley and West Bromwich Banking Company v. Spittle*, 1 J. & H. 14.) The foundation of this rule is that the creditor owes a duty to the public to prosecute, and when that duty has been performed he may proceed for his debt. But where a debt arises out of an act which there is no reasonable or probable cause for believing to be a criminal act, to hold that upon an allegation that the act was criminal the remedy was suspended, would be to force upon the creditor the institution of a prosecution which would in itself be a wrongful act and might render him responsible in damages. Upon the whole I am of opinion that, although there is a public interest that a prosecution already instituted, even without a probable cause, shall be brought to a conclusion in due course of law, there is no such interest in a prosecution being commenced. For these reasons I am of opinion



that the agreement in the present case not to institute criminal proceedings was not illegal, and that, whilst it was nugatory and insufficient as a consideration to support a contract, it did not avoid a contract for which there were other sufficient legal considerations. I may observe here that this view is consistent with the decision in *Pool v. Bousfield* (1 Camp. 55). There the sole consideration for the extinguishment was the agreement not to move the Queen's Bench. The word "illegal" is no doubt used by Lord Ellenborough; but the facts of that case rendered it unnecessary to draw the distinctions to which I have been obliged to refer. Some reliance was placed by the defendant's counsel upon a passage in Lord Denman's judgment in *Kier v. Leeman*. There, after referring to *Collins v. Blantern*, the Chief Justice says: "Of the soundness of that decision no doubt can be entertained, whether the party accused were guilty or innocent of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe." Every word of this sentence is correct. *Collins v. Blantern* was the case of an agreement to stifle a prosecution already commenced. The discontinuance of that prosecution was the sole consideration for the bond, and, as the law recognises no interest in a prosecution save that of the public, the bond was absolutely without consideration, and the obtaining of it upon a promise to stifle a prosecution was an abuse of the law, which might well be described as extortion. But I do not understand Lord Denman as putting extortion or duress as the ground of the decision, or as referring to it for any other purpose than to show that in consequence there was an abuse of the law for private ends. There were two arguments on the part of the defendant which pressed upon me with considerable weight during the discussion. It is said first (and it is in my opinion clear law) that a contract not to give testimony in a criminal, or even in a civil suit, is illegal, as against public policy; secondly (and here I think is the fallacy of this argument), that such a contract as the present involves an obligation not to give evidence in a prosecution if it be in fact instituted. If I thought that to be the true meaning of the contract I should be of opinion that it was illegal. But there is a clear distinction between a prosecutor and a witness. It arises every day in actions for malicious prosecution. The present contract is no more than not to prosecute; and, if there were a prosecution by another person, evidence given by the present plaintiff could not be held to be a breach. The second argument which pressed me was that, the plaintiff having threatened to resort to criminal proceedings and thereby obtained the bill now sued on, he ought to be estopped from denying that without which his threat would have been unjustifiable and idle, viz., that the bill was a forgery. I fully appreciate the weight of this argument, and the pressure which may be exercised by unscrupulous holders of instruments alleged to be forged, who by threats of prosecution extort from the

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fears of criminals or others contracts which otherwise would not be entered into. I see, too, the danger of permitting the validity of the contract to depend upon its being possible to prove guilt at a time after the contract has been performed and the evidence of that guilt probably destroyed. But upon full consideration I think that this threat constituted part of a different line of defence, viz., that to which I adverted in the commencement of my judgment. If we had here a defence of duress or extortion, relying upon the threat and the circumstances under which it was made as amounting to such pressure as rendered the contract unjust or inequitable, a different question would arise. We should then have to deal, not as we have here, with a matter of illegality alone. We should have to determine to what extent, if at all, the threat prevented the defendant from acting as a free agent; and I confess that, in determining the effect which might reasonably be produced on his mind by a statement of forgery, I should be slow to listen to a statement by the utterer of the threat that it was one for which there was no solid or reasonable foundation. If the defence here clearly showed that the plaintiff groundlessly had alleged or represented that the former bill was in fact forged, that the representation was made to the defendant, and that the defendant believed that allegation, and in consequence accepted the bill sued upon, it would take much more argument than I have yet heard to convince me that such a defence was bad. These allegations, however, are not in the defence here. It does not rely either upon estoppel or upon pressure. The sole ground is that the contract was against public policy, and for the reasons I have already stated I have been coerced to arrive at the conclusion that it cannot be sustained. Upon the demurrer therefore the judgment must be for the plaintiff. This being so, our view as to the new trial motion is of very little importance, as under any circumstances the final judgment must be for the plaintiff; and, as the defence to which the demurrer was taken was filed at *Nisi Prius*, we could not refuse to give the plaintiff the costs of the trial. I therefore prefer not to express any opinion upon that portion of the case. The verdict should, in my opinion, be entered for the plaintiff with costs.

*Demurrer allowed with costs.*

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## KENT LENT ASSIZES, 1875.

MAIDSTONE.

March 11.

(Before Mr. Justice DENMAN.)

REG. v. MORGAN. (a)

*Murder—Dying declaration made when actually dying—Admissibility of, from nature of the wound, in absence of express evidence as to cause of death.*

*On a trial for murder, the death having been caused by cutting the throat, all the vessels and arteries having been severed, and death therefore certain to ensue, and in fact ensuing almost immediately afterwards, a declaration having been made by deceased in writing (he having no power to speak), about five minutes before death, when he was actually dying, it was held by Denman, J., after consulting Cockburn, C.J., that the declaration might be admissible, and that they were not prepared to hold that it was not so; but that with reference to some decisions, and especially Reg. v. Cleary (2 F. & F. 850), it would be proper, if it was admitted, to grant a case for the Court for Crown Cases Reserved.*

**T**HE prisoner was indicted for the murder of one Joseph Foulstone, at Shorncliffe. (b)

*Biron and Dering for the prosecution.*

*Norman and Grubbe for the prisoner.*

The prisoner and the deceased were soldiers, in the same hut. About nine o'clock at night, there being no one else in the hut but another soldier, dead drunk in bed, and two boys, both of whom the prisoner sent away on different pretexts, so that he

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

(b) This case is now reported, in consequence of its bearing on the case of *Reg. v. Bedingfield*, which excited a great deal of discussion; and also by reason of its reference to *Reg. v. Cleary* (2 F. & F. 850), which in both cases appears to have been quite misunderstood, and is here stated correctly; and lastly, because it shows the correct course to be taken in such cases.

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was virtually alone with the deceased, who almost immediately afterwards was seen coming out with his throat cut quite to the back of the neck, so that he could not speak while in that state. He only a few minutes before death, and while he was dying, wrote a statement as to who had done the act.

*Biron*, in stating the case for the prosecution, referred to this statement, but being aware that its admissibility would be disputed, he did not state what it was.

The first witness, the man who saw the deceased coming staggering out of the hut with his throat cut, stated that while sitting down he wrote a paper—produced.

The learned Judge said, before it was offered in evidence it would be proper to receive all the evidence as to the circumstances of the case, for, in determining whether it was admissible, he should have to consider all the circumstances, one of which would be the time when the man died. (a)

The witness stated that the deceased had to be held up, that he could not speak, nor even hold his hand up steadily, and that though, when the prisoner was brought in, the deceased pointed with his hand to him, and held up his arm as well as he could, "it shook so that he could not hold it steadily, and had to let it fall." He was "very much exhausted," and "was bleeding fearfully from the throat." A man had to hold his arm "round him to keep him up." "He motioned for paper, and wrote on it." Almost immediately afterwards, in three or four minutes, the doctor came, and the deceased died about five or six minutes after he came; so that, according to the evidence, the deceased died within ten minutes after he wrote the paper.

The surgeon stated that he was called to the hut "a few minutes after nine o'clock," and found the deceased sitting, supported by two men, bleeding profusely from the throat, his whole dress covered with blood. He found it, he said, impossible to stop the flow of blood, the wound was so extensive, severing all the chief blood-vessels of the neck on the right side. "Nothing," he said, "could save him; he was dying—indeed, when I saw him, his eyes were already assuming a glassy stare, and he was becoming unconscious—the immediate precursors of death." He lived only a few minutes—from five to six minutes—after the doctor came, and he came "almost immediately" after the paper was written. "The windpipe was quite severed; the bones of the neck were exposed." In short, it appeared that the man's head was all but off, and was held on chiefly by the vertebræ of the neck.

On this evidence,

*Biron* tendered the paper in evidence.

(a) It is conceived that this, which was the course taken by Erle, C.J., in *Reg. v. Cleary* (2 F. & F. 850), was the proper course to be taken in such cases; and further, that, in the absence of express evidence as to whether the deceased knew he was dying, the surgical evidence as to the nature of the wound, and what must have been his state and feelings at the time, ought to be (as it was here) taken into consideration.

*Norman*, for the prisoner, objected that it did not appear that the deceased knew that he was dying. He cited *Reg. v. Jenkins* (1 C. C. R., 187; 11 Cox C. C., 250), in which (in a case of drowning) the statement was made some hours before death, and in which the deceased said she had "no hope of life at present," and it was held that her statement was inadmissible, but

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DENMAN, J., said that there the decision turned on the effect of the woman's statement as to expectation of death (a) and that the Court thought it was materially qualified.

*Norman* then cited *Reg. v. Cleary* (2 F. & F. 853), as showing that the nature of the wound was not in itself sufficient to show that the party must have known he was dying. (b) He urged that in the present case there was nothing but the nature of the wound from which to draw the inference that the deceased must have felt that he was dying, and that it was not sufficient.

DENMAN, J., said that he himself had not any doubt, but that he should, as the point was important, consult Cockburn, C.J., his colleague in the commission, which he accordingly proceeded to do, and on his return said that neither Cockburn, C.J., nor himself was prepared to say that the statement might not be admissible; but that, after consulting Cockburn, C.J., he could not admit it without reserving a case for the Court for Crown Cases Reserved; for there was no case (c) in which the judge had admitted the statement entirely upon an inference drawn from the nature of the wound itself, and from giving the deceased credit for ordinary intelligence as to its natural results. On the contrary there was a case (d) in which an eminent judge had held that the nature of the wound itself was not sufficient ground on

(a) So in almost all the cases in which the Court for Crown Cases has held a declaration not admissible—the decisions have turned on the terms of the statement with reference to the expectation of death; and on their insufficiency to exclude the idea of hope of recovery. There is no case in which it has been held that, in the absence of such express evidence, the nature of the wound may not show that the person must have felt he was dying.

(b) This case was much misunderstood, and not only does not show this, but shows clearly the contrary. There the man was shot in the chest, and lay for some time, and when found was removed to a house and there was tended, and died soon afterwards. He had said something, and not only said nothing to show that he thought he was dying, but, according to the evidence, did not appear to think so. The report states that Erle, C.J., asked the policeman, "At the time did it appear to you that he was under the expectation of immediate death?" The policeman said he did not. Erle, C.J., upon that held the statement inadmissible. It was then pressed that the nature of the wound itself was such as to show that the deceased must have been under the expectation of impending death; but Erle, C.J., said "he could not in the absence of evidence presume that a man who had been shot through the body must necessarily feel that he was about to die." That is, that he could not, without any surgical evidence on the point, and against positive evidence the other way—the man only being shot through the body—a kind of wound from which myriads have recovered—presume, contrary to the express evidence, that the man must have felt that he was dying. This plainly implies that in a different kind of case, one of such a class as the present, where, according to the surgical evidence, the man was dying, and could not be saved, and must have felt that he was dying, it might be presumed, in the absence of any express evidence, that the party must have felt he was dying.

(c) That is, none reported; probably because it was never doubted.

(d) It is presumed that this was *Reg. v. Cleary*, cited *ante*.

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which to draw such an inference as to the party having known himself to be in a dying state. (a) In the face of that decision the evidence, therefore, could not be admitted without reserving a case, and under those circumstances it was for the counsel for the prosecution to consider whether he would press the admissibility of the statement, or proceed with the case without it. (b)

The latter course was pursued; and the case was carried through without the statement. There was, indeed, a difficulty; the defence set up being suicide, and there being no direct evidence to rebut it; but in the result, the learned judge carefully pointing out the circumstances under which the deceased had run out and pointed to the prisoner—the jury, though not without hesitation, then delivered a verdict of

*Guilty. Sentenced to death. (c)*

(a) That is, in that particular case (*vide supra*), but it is conceived that the decision plainly implied that the inference might be drawn where from the nature of the wound the party could not doubt that he was dying.

(b) It appears, therefore, that if it had been pressed it would have been admitted.

(c) The prisoner was executed, and there could be no doubt as to his guilt; but the hesitation shown by the jury indicated the risk which is run in such cases by the exclusion of the statements of the deceased, while those of the prisoner are necessarily admitted—not, indeed, as evidence, but as entitled to consideration and credence in the absence of evidence to the contrary. It is remarkable how recent in its origin is the notion that such declarations by the deceased are only admissible as dying declarations, and upon proof that they were made under the sense of impending and imminent death. They would clearly be admissible as part of the matter in hand, for whether the act be suicide or murder, it is clearly homicide; as the person who inflicted such a wound must have intended death, and as the act is not immediately effective, it is inchoate and incomplete until consummated by death. This probably was the ground on which, after the Revolution, such statements by the wounded persons at any time before death, and without requiring any evidence that they were made under the sense of immediately impending death, were admitted without hesitation: (*Reg. v. Reason and Tranter*, 1 Strange's Reports, 499.) The notion that such statements were only admissible if made under the sense of immediately impending death was of later origin, and may have arisen from misconception as to the effect of that decision, in which there was no allusion as to that as a necessary and precedent condition. Even when that notion had begun to be introduced, it was still recognised as law that it was sufficient to show apprehension of danger, and that this might be inferred either from the express declaration of the deceased or from the nature of the wound, and other circumstances (*Reg. v. John*, 1 East's Pleas of the Crown, 357); and it was only by degrees it was held to be necessary to show that the party believed he would not recover: (*Reg. v. Tinkler*, 1 East P. O. 354.) It was only in the present century it was held that it was necessary to exclude all hope of recovery, and this was held only by single judges on circuit, who had no power to overrule previous decisions, or to alter the old law. Even then, too, it is to be observed that the old doctrine still was so far adhered to that it was held that statements by the deceased after a mortal wound may be received, though he did not express any apprehension as to approaching death: (*Reg. v. Woodcock*, 1 Leach C. C. 500). It is obvious that such statements are regarded as exceptions to the general rule, for it was said they are not admissible except on trials for murder, and when relating to the death: (*Reg. v. Mead*, 2 B. & C. 605). But in the older books and cases, as in East's Pleas of the Crown, such cases are spoken of only as instances and illustrations of a great general principle, that in any case the best evidence which in the nature of the case is obtainable is admissible, when the fact proved, as a statement of a party to the matter in hand is in the nature of original evidence, and that these statements are admissible on the ground of necessity. And that evidence should be required that the statement, even when made by a person in the very article of death, and unable to speak, was made under the sense of impending death, is a requirement only introduced into our criminal trials within the lives of living judges.

## CROWN COURT.

NORWICH WINTER ASSIZES, 1879.

(Before COCKBURN, C.J.)

REG. v. BEDINGFIELD. (a)

*Murder or suicide—Evidence—Statement of deceased—Dying declaration—Res gestæ.*

*On an indictment for murder, it appearing that the deceased, with her throat cut through, came suddenly out of a room, in which she left the prisoner, who also had his throat cut, and was speechless, and that she said something immediately after coming out of the room, and a few minutes before she died—the question being, murder or suicide*

*Held, that her statement was not admissible, either as a dying declaration or as part of the res gestæ. Sed quære, whether in such a case the act is complete until death takes place, and whether, as to a dying declaration, it is not a question of fact, upon the surgical evidence, whether, from the nature of the wound, the person must not have been conscious of almost immediate death.*

**T**HE prisoner, Henry Bedingfield, was indicted for the murder of a woman at Ipswich.

*Carlos Cooper and Blofeld for the prosecution.*

*Simms Reeve for the prisoner.*

It appeared that the prisoner had relations with the deceased woman, and had conceived a violent resentment against her on account of her refusing him something he very much desired, and also as appearing to wish to put an end to these relations; he had uttered violent threats against her, and had distinctly threatened to kill her by cutting her throat. She carried on the business of a laundress, with two women as assistants, the prisoner living a little distance from her. On the night before the day on which the act in question occurred, the deceased, from something that had been said, entertained apprehensions about

(a) Reported by W. F. FENLASON, Esq., Barrister-at-Law.



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him, and desired a policeman to keep his eye on her house, and he being near at ten at night heard the voice of a man in great anger. Early next morning, earlier than he had ever been there before, he came to her house, and they were together in a room some time. He went out, and she was found by one of the assistants lying senseless on the floor, her head resting on a footstool. He went to a spirit shop and bought some spirits, which he took to the house, and went again into the room where she was, both the assistants being at that time in the yard. In a minute or two the deceased came suddenly out of the house towards the women with her throat cut, and on meeting one of them she said something, pointing backwards to the house. In a few minutes she was dead. In the course of the opening speech on the part of the prosecution it was proposed to state what she said. It was objected on the part of the prisoner that it was not admissible, and

COCKBURN, C.J. said he had carefully considered the question and was clear that it could not be admitted (a), and therefore ought not to be stated, as it might have a fatal effect. I regret, he said, that according to the law of England, any statement made by the deceased should not be admissible. Then could it be admissible (b) having been made in the absence of the prisoner, as part of the *res gestæ*, but it is not so admissible, for it was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard.

Counsel for the prosecution consequently did not state what the deceased said, but said they should tender it in evidence, and accordingly, when the witness was called—one of the assistants who heard the statement—she was first asked as to the circumstances, and stated that “the deceased came out of the house bleeding very much at the throat, and seeming very much frightened,” and then said something, and died in ten minutes. (c)

It was then proposed to prove what she said, but

COCKBURN, C.J. said it was not admissible. Anything, he said, uttered by the deceased at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as “Don’t, Harry!” But here it was something stated by

(a) *Quære*, whether it could be properly admitted, except upon the evidence especially as to the nature of the wound, the time of death, and other circumstances showing whether she must not have been conscious of death—circumstances probably not appearing on the depositions.

(b) Apparently the Lord Chief Justice had not in his mind the possible admissibility of the statement as a dying declaration, which would depend (in the absence of express evidence) on the evidence of the surgeon as to the nature of the wound and the probable state of the deceased: (See *Reg. v. Morgan, ante.*)

(c) The question whether these circumstances were not sufficient, at all events coupled with the evidence subsequently given by the surgeon as to the nature of the wound and its probable effect on the system, and her actual death in a few minutes, to show that she must have been under the sense of impending death—was not much argued, the Lord Chief Justice having already intimated that his mind was made up.

her after it was all over, whatever it was, and after the act was completed.

It was submitted, on the part of the prosecution, that the statement was admissible as a dying declaration, the case to be proved being that the woman's throat was cut completely and the artery severed, so that she was dying, and was actually dead in a few minutes; but

COCKBURN, C.J. said the statement was not admissible as a dying declaration, because it did not appear that the woman was aware that she was dying. (a)

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(a) At the era of the Revolution it was not doubted that the declarations of the deceased, made after the fatal stroke, were admissible in evidence, apparently without requiring any other evidence that the person must have known he was dying beyond the fact that he was dying and was speedily dead. Thus on a trial for murder, where the deceased had received nine wounds with a sword, and was dying, the counsel for the prosecution offered to give in evidence several declarations made by the deceased on his death bed, whereby he charged the prisoners with having barbarously murdered him; and the court, without hesitation, let in the evidence; upon which they called the clergyman who attended the deceased, and who swore that being desired by some friends to press the deceased to say what provocation he had given them to use him in that manner (with repeatedly stabbing him), he declared, as a dying man, that he gave no provocation, but that they barbarously murdered him (1 Strange, 449) subsequently, however, admitting that he had struck one of them with a small cane, which, of course, would be too slight a provocation to excuse not merely a single wound with a deadly weapon, but repeated, barbarous, and murderous wounds, repeated not less than nine times, running him through the body over and over again, evidently with murderous intent. The mere fact that the party said he was dying or described himself as dying, would, of course, be immaterial if, in fact, he was not dying and did not die for some time; and on the other hand if from the event it appears that he was dying, and from the nature of the wounds it was manifest that he must have felt himself dying, the statement is to be regarded rightly as a dying declaration, whether or not the person described himself as dying; and there are probably no modes of violent death in which a few minutes before death the party does not feel that he is dying, and certainly it is difficult to conceive a person dying a violent death from some mode of murder who must not so feel within a few minutes of death. Hence the doctrine on the subject, settled in the middle of the last century, was, that it may depend on the nature of the wound or cause of death, and that from this alone it may be inferred, without further or express evidence, that the party making the declaration must have known that he was dying: (East's Pleas of the Crown, vol. 1, p. 357.) The apprehension of danger may appear either from the express declaration of the deceased at the time, or may be inferred from the nature of the wound, the state of the deceased, or other circumstances indicating it: (*Ibid.*) And though, as a learned judge once said, some of the recent decisions on the question have gone to the extent not only of over-scrupulousness but of superstition, their general scope and effect is in accordance with the old doctrine. Thus, per Patteson, J.: "It is not necessary to prove by expressions of the deceased that he was in apprehension of almost immediate death; but the judge will consider from all the circumstances whether the deceased had or had not any hope of recovery: (*R. v. Bonner*, 6 C. & P. 386.) Any decisions apparently contrary are in cases in which statements of the deceased themselves raised doubts from their ambiguity as to whether the deceased thought he was dying or had a hope of recovery. But the old doctrine that the nature of the wound may be sufficient without any express evidence was laid down by Erle, C.J. in a case of a mortal wound by shooting: (*R. v. Cleary*, 2 Fes. & Fin. 853.) In a case exactly like the present, tried before Denman, J., at Maidstone Lent Assizes, 1875 (*ante*, p. 337), the case of a soldier whose throat had been cut by a comrade, and who could not speak, and had just strength to write his name before he died, the learned judge after consulting Cockburn, C.J., did not doubt the statement was admissible, though, from a misconception of the effect of the ruling of Erle, C.J., in *Reg. v. Cleary*, he said he should, if the evidence was given, reserve the point, and, as there was abundant evidence without it, it was not pressed, and the prisoner was convicted and executed.

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It was urged that the woman must have known it, as she was actually dying at the time, but

COCKBURN, C.J. said that though she might have known it if she had had time for reflection, here that was not so, for at the time she made the statement she had no time to consider and reflect that she was dying; there is no evidence to show that she knew it, and I cannot presume it. (a) There is nothing to show that she was under the sense of impending death, so the statement is not admissible as a dying declaration.

The surgeon being called stated that the wound was from three to four inches in length, completely severing the trachea or wind-pipe, severing the jugular vein and the thyroid arteries. It could not be said to have been suicide, for the strength would wholly fail after the trachea was severed, which was about the centre of the wound, and the wound deepened from the trachea towards the right, the deepest part of it being beyond the trachea, so that the woman's throat must have been cut right through.

The statement of the deceased, however, having been twice rejected, though it was offered and rejected before the surgeon was examined, who thus described the nature of the wound, necessarily mortal in a few minutes, and the woman in fact dying in about ten minutes, not speaking again; the statement was not tendered again upon this evidence as a dying declaration, nor was the surgeon asked, as a matter of skill and science, whether from the nature of the wound and the sense of approaching death, the woman must not have felt and known that she was dying. (b)

The defence set up by the prisoner being that the woman had first cut his throat and then her own with a razor she had borrowed from him professedly for another purpose, a curious question of circumstantial evidence arose as to whether this was the truth of the case, or the converse view set up by the prosecution that the prisoner had first cut the woman's throat and then his own. The statement made by him would, therefore, have been very material, and its rejection, as it turned out, nearly caused a miscarriage of justice. The doubt of the prisoner's guilt was indeed removed by the fact that the deceased ran out to make complaint or outcry, and the fact that the razor was found under his body, and under his hand,—almost in his hand—for the marks of his fingers were upon it, and it was evident that he had

(a) The question whether on such evidence the woman must not have known she was dying was not discussed and considered.

(b) In the case of *R. v. Cleary* (2 Foa. & Fin. 853) Erle, C.J. asked as to what the deceased said, and finding that what he said showed that he did not think he should die, he then said he could not, in the face of that evidence, presume from the nature of the wound (a shot wound through the chest) that he knew he was dying. But here, there being nothing to the contrary, the sense of impending death might be inferred from the nature of the wound itself as showing that the woman must have felt she was dying; at all events, the surgeon might have been of that opinion, and it is a question of fact, and to some extent one for skill and experience.

held it in his hand, and that his hand had only just relaxed its grasp with the weakness caused by loss of blood.

COCKBURN, C.J., in summing up the case to the jury, pressed both these facts upon their attention, especially the first, pointing out that it was the deceased woman, not the prisoner, who ran out, as though to make outcry or complaint. (a)

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*Verdict, Guilty ; Sentence, Death. (b)*

(a) Thus, curiously enough, making indirect use of the very piece of evidence formally rejected, but which could not virtually be excluded ; for it was of course necessarily in evidence that the woman ran out and said something, pointing to the house where the prisoner was, and no one could doubt that she came out to make complaint or outcry.

(b) There was a strong movement in favour of the prisoner, on the ground that the woman's statement had been rejected, and that it might have been in his favour, or that its falsehood might have been shown ; and if the circumstances had been less conclusive it is possible the movement might have been successful. The prisoner, however, was executed ; but there was considerable discussion on account of the rejection of the evidence, and it must not be presumed that the question should be discussed upon the supposition that the statement is inimical to the accused, for, supposing it to be in his favour, the objection, if valid, would equally apply. In the present case the words sworn to on the depositions were, "See what Harry has done !" which, as the Lord Chief Justice said, would probably have been fatal to the prisoner ; but suppose they had been, "See what he has driven me to !" they would have been sufficient, probably, to secure an acquittal. And it was impossible to say what on cross-examination the words might have appeared to be. Mr. Pitt Taylor, the author of the well known Treatise on the Law of Evidence, publicly impugned this ruling, and published a letter in the *Times*, pointing out that it was contrary to the doctrine laid down in decided cases, and that what was said by a person on the instant, and in consequence of something first done to her might partly be considered as part of the *res gestæ*, as much so as if uttered an instant before, while it was being done. And a barrister present at the trial also wrote, pointing out that according to the doctrine laid down nearly a century ago, and not at all impugned in *Reg. v. Cleary*, the statement was clearly admissible as a dying declaration, as the natural and irresistible inference was that the woman must have felt and known she was dying. Cockburn, C.J. published a pamphlet in answer, in which he contended that as to a dying declaration it was for him to decide whether it was made under the sense of impending death, and that as to *res gestæ* the "transaction" was completed. Mr. Pitt Taylor replied in a pamphlet upholding his original opinion. In fairness to the Lord Chief Justice, it should be stated that certainly the ruling of Erle, C.J., in *Reg. v. Cleary*, had been understood, or misunderstood, as adverse to the reception of such a statement, and he was, as he said, apprehensive of the risk of a failure of justice if the evidence was admitted, and held admissible. But that was a very different case, and in that case Erle, C.J. *heard the evidence*, and so did Denman, J. in *Reg. v. Morgan*, *ante*, p. 337.

## CROWN COURT.

MAIDSTONE WINTER ASSIZES, 1879.

(Before COCKBURN, C.J.)

REG. v. WESTON. (a)

*Murder or manslaughter—Death caused by shot from firearm—Evidence of self-defence—Admissibility of prisoner's statement by counsel—Justification—Danger of violence, or reasonable apprehension of it.*

*On an indictment for murder, the death having been caused by shot from a gun in the hands of the prisoner, evidence of former threats by deceased of deadly violence, with words and circumstances on the occasion in question likely to provoke similar threats, received as evidence of danger to life, or serious violence or reasonable apprehension of it, on the occasion, such as might excuse or justify recourse to a loaded firearm in self-defence.*

*Prisoner's counsel allowed to make a statement on the part of the prisoner to show that the trigger of the gun was pulled without the intention of firing it.*

*The use of such a weapon, even against an unarmed man, may be excused or justified not only by necessity for defence against death or serious injury, but the reasonable apprehension of it.*

*But in the absence of such necessity, if it is resorted to, and is fired even accidentally, it is manslaughter; and the jury having found that there was no such necessity, but that the gun, being levelled at the deceased with no intention of discharging it, went off by accident.*

*Held, that the prisoner was guilty of manslaughter.*

**T**HE prisoner was indicted for the murder of one Drewry, at Maidstone, on the 2nd day of September last.

*Prentice, Q.C., and Croft, for the prosecution.*

*Kingsford and Slade Butler, for the prisoner.*

The prisoner, who was a volunteer, had, five years before the occasion in question, lodged with the deceased, who was married, and had several children. Four years before, the deceased had

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

to be removed to an asylum, being affected by a form of melancholy monomania called "syphilitic mania," arising, as the medical man stated, from a delusion that he was suffering from syphilis, and not leading to violence, but producing an impression that he was not fit to cohabit with his wife. On his liberation from the asylum, after the lapse of four months, he resumed cohabitation; but his delusion returned, and he was confined again for eleven months. During this period the prisoner had become criminally intimate with the wife, who had a child by him; and when her husband was released he did not cohabit with her, and expressed great anger about the child, and uttered threats against them. He again relapsed into his monomania, and was again sent to the asylum, where he remained eight months, coming out in August. At this time his wife was living in a house in Woollett-street, Maidstone, which had been taken during his confinement in the name of Weston, the prisoner, who contributed to her support, he himself, however, ostensibly living at another place in Maidstone, and the deceased having his meals at the house where his wife lived, though he slept elsewhere, not far off. It appeared that there had been an agreement or understanding between the two men that neither of them should cohabit with the wife of deceased; for the prisoner had insisted on his observing an agreement not to molest her, and the deceased had expressed anger on finding the prisoner at the house. The prisoner had written to the wife a letter dated at the other house, where he was supposed to reside, in these terms :

It appears Drewry keeps paying you visits at Woollett-street, the premises being near You must know that I cannot think of allowing you any more money unless they are discontinued altogether. You must therefore see to it. That was the agreement; that he would leave you without molesting you in any way whatever. You will please let me know what you intend doing at your earliest convenience.

It appeared that this letter was written to be shown to the deceased, as the wife said he could not read, and she did in fact show it to him, and he told her to take no notice of it, and continued to have his meals at her house as before. Being asked if there was any agreement that she should live with Weston, she said she was not aware of any, and it will be noticed that the prisoner wrote from another house. On the Friday before the occasion in question (she stated) her husband, the deceased, coming to her house, found Weston, the prisoner, sitting there, and was angry, and uttered threats against him, and against them both, threatening to take their lives; and on a previous occasion he had, finding Weston there, used, she said, similar language, threatening to lie in wait for him and kill him, and there had been other similar threats on such occasions, but no actual violence was used. It appeared that on one occasion she had warned the prisoner, in consequence of something, not to use his weapon, for it was stated, it will be seen, by one of the witnesses that, on finding her husband shot, she said to the

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prisoner, "I told you not to do it!" and, though she did not, she said, recollect this, she did not deny it, and she said the prisoner had said, "I will not be the first to lift my hand, but if Drewry should strike me, I must take my own part." It appeared that on the day in question the prisoner's rifle was in the front room of the house where the wife of deceased, Mrs. Drewry, lived, and that it was loaded; and she stated it was kept there, and it appeared that the box of service cartridges was upstairs locked. She stated that she did not know whether he was in the habit of keeping the rifle loaded, and she also stated that she had seen him practising loading and unloading with a cartridge. She did not state that she had seen him doing so that day, nor when she saw him doing so last, nor was there any evidence beyond the prisoner's statement that he had been practising at the butts that day, but he so stated. She, however, stated that she had seen the rifle in the front room when she went out in the afternoon on the day in question. She stated her husband had been at the house as usual having his meals, and she had gone out and returned; and about eight o'clock in the evening of the 2nd day of September she was standing at her door, the prisoner having just left her to go to the public-house a few doors higher up in the street, when her husband, the deceased, came up to her and spoke to her, asking her where she had been, &c. She at once moved to the door of her next-door neighbour, and, saying she wanted to speak to her, went in there, her husband saying angrily, "Oh, yes, you have some plan!" While she was talking with her neighbour, she heard, she said, some one in her house, who probably was the prisoner, returning with the beer; and it appeared that he must have locked the street door, for a minute later she said she found it locked, and it was opened to her by him from the inside. It appeared that he went through the house and out of the back door, probably—not finding Mrs. Drewry—in search of her; and it also appeared that the deceased had gone round by the side passage, by the side of the neighbour's house, and was round at the back door, by which way his wife could have got back into her house, for a few moments later the neighbour heard her back doorlatch raised, and heard the loud voices of two men in anger, and the neighbour, going to her back door, saw Weston, the prisoner, and Drewry, the deceased, standing there, close to each other, in the passage at the backs of the houses. She heard Drewry say to Weston, holding up his finger, "Continue to live with my wife," which may have been, "I find you continue to live with my wife," or, as the prisoner's counsel suggested, may have been a threat of violence, "If you continue to live with my wife," in which latter view, however, the threat would be future and conditional. The precise words, however, she did not hear, but it will be seen that the prisoner did not at the time suggest any violence, or threat of violence; and it was consistent with the evidence, as the voices of both were heard raised, that he might have said to

Drewry, in accordance with the terms of his letter, that Drewry had no business there, and that Drewry might have answered, "I have a right to come if, or as, you continue to live with my wife," but the prisoner's counsel suggested that some threat of violence preceded the words, "continue to live with my wife." The witness stated that Weston ran quickly into Mrs. Drewry's house; he went so quickly, however, she said, that she did not actually see him enter the house, and the deceased followed her. She went back into her own house, and went through to her front door, and as she got to it, in a few seconds, she heard the report of a gun, and, looking out, saw Mrs. Drewry, who had run out, trying to get in at her front door, which, however, was fastened from the inside; but being opened by the prisoner she went in and found in the back room her husband lying dead, his feet towards the front room, where the rifle was kept, his head backwards towards the cellar, the rifle leaning against the door between the two rooms. A witness stated that she said to the prisoner, "What have you done? I told you not to do it," and this she did not deny, although she said she "did not recollect it." When the police came they found the clothes of the deceased burning, showing that the weapon had been held close to his person, and the surgeon stated that, from the wound, he must have died on the instant. The prisoner said, "I did it; I had had some drink." He did not say anything of threat or violence, and the police saw no trace of a struggle; and as already stated, only a few seconds elapsed between the moment when the two men entered the house together, and the sound of the report, and the deceased appeared to have been shot in the back room, the rifle being kept in the front. The police stated that when the prisoner said he did it, she said to him, "Why did you do it? I know he had threatened you, but you had better have let him knock your head off than do it." The cartridge case found in the rifle was not one which could have been served out during the last year. When the prisoner was charged with shooting at and killing the deceased he made no answer at first; but then—according to the evidence of the police—said he had been at the rifle butts that day, and had expended all his service ammunition, and was allowed to purchase private ammunition; that he had the rifle in his hand and put a cap upon it, and the gun went off; but this, it was suggested by his counsel could not have meant a percussion cap, as it was not a percussion rifle, and that what he must have said was that as there was a snap-cap on he thought it would not go off, even when the trigger was pulled, and pulled the trigger under that notion, which was the defence now set up.

Evidence was given for the prosecution that though the prisoner, being a volunteer, was allowed to take his rifle home, he had no right to have ball cartridge there, and it did not appear that he was at drill that day. The gunsmith proved that the rifle seemed to have been used more than once since last cleaned.

*Prentice*, for the prosecution, pointed out that there was no

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evidence of any struggle or violence, or even of any menace of violence on the occasion; and that on the contrary all the evidence tended to disprove it, for the police saw no signs of a struggle, and the prisoner did not suggest it at the time, and indeed there was no time for it, as the witness stated that only a few seconds intervened between her seeing the two men go into the house and her hearing the report of the gun; and he suggested that the prisoner, angry at seeing the deceased there, had gone quickly into his house into the front room, where his loaded rifle was, in order to use it against the deceased, and had met him in the back room and shot him dead with it.

COCKBURN, C.J. said he saw no evidence of it.

*Prentice* suggested that the fact that only a few seconds intervened between the men going into the house and the report of the gun, and the fact that the gun was kept in the front room, and that the deceased was shot in the back room, and that the gun was held so close to him as to set his clothes on fire, and that he must have fallen dead instantly on the spot, went to prove that the prisoner must have gone at once to the rifle, brought it into the back room, and there met the deceased and shot him dead without any struggle or violence; and even had there been any threat of violence, of which he said there was no evidence, and which therefore was never suggested, still, as the deceased was unarmed there was nothing to excuse the use of a deadly weapon, or to reduce the crime to manslaughter.

*Kingsford*, for the defence, regretted that he could not give the prisoner's account of the matter, upon which

COCKBURN, C.J. said he might do so, as the prisoner's counsel were in place of the prisoner, and entitled to say anything which he might say, for which he would be entitled to consideration and credence if consistent with the rest of the evidence. Upon this

*Kingsford* stated to the jury that the prisoner had been in the habit of practising loading and unloading his rifle with a cartridge, and had left the cartridge in it; that on this occasion the deceased had threatened him, that he had fled from apprehended violence, and that, forgetting that the rifle was loaded, he raised it against him, not intending to fire, but only to frighten him—the snap-cap being on—by the noise of uncocking the gun; that the deceased laid hold of the end of the frame, that in the struggle the “snap-cap” fell off, and that, pulling the trigger to snap the hammer again, the weapon went off.

COCKBURN, C.J., in summing up the case to the jury, adopted the view of the evidence which the prisoner's counsel had suggested, and enforced it strongly upon the jury, reminding them of the previous threats of the deceased to kill the prisoner, and to lie in wait for him in order to do it, and telling them that he had no doubt the deceased had, on the occasion in question, entertained very violent feelings against the prisoner, who might naturally dread his violence, and he represented the prisoner as “flying from a

man enraged, infuriated, and mad," who had previously threatened his life, and in all probability had done so on this occasion; and he told the jury that if, under such circumstances, the prisoner resorted to the gun in order to defend himself from serious violence, or under a reasonable apprehension of it, and so used it in necessary self defence he would be justified. If, he said, the prisoner fired the gun at the deceased really in anger, or intending to take the opportunity to be rid of him on account of his wife, it would be murder; but if the prisoner resorted to the gun in self-defence, against serious violence or in the reasonable dread of it, it would be justifiable, and that even if there was not such violence, or ground for the reasonable apprehension of it, yet that if the conduct of the deceased naturally led him to apprehend it and deprived him of his self-control, or if an assault, though short of serious injury, was committed on the prisoner, then it would be manslaughter; and in conclusion he left to the jury these questions in writing:—1. Was the discharge of the gun intentional or accidental? (a) If intentional, was it from ill-feeling to Drewry, or desire to get rid of him on account of his wife? in which case it would be murder. (b) If it was not so done, was it done by the prisoner in self-defence, and to protect himself from death or serious bodily injury intended towards him by the deceased; or (c) from the reasonable apprehension of it induced by the words and conduct of the deceased, though the latter may not, in fact, have intended death or serious injury? (d) If not so, was it done after an assault made by the deceased on the prisoner, though short of an assault calculated to kill or cause serious bodily injury? or (e) Was it done under such a degree of alarm and bewilderment of mind, caused by the conduct of the deceased, as to deprive the prisoner for the time of his reason and power of self-control? or (f), Was the effect of the language and conduct of the deceased such as to provoke the angry passions of the prisoner so as to deprive him of his reason and power of self-control? 2. If the discharge of the gun was accidental—in which case the prisoner cannot be convicted of murder, but may be of manslaughter—(a) was the gun levelled by the prisoner at the deceased in self-defence against an attack of the deceased, endangering life or limb, or reasonably apprehended by the prisoner as likely to do so, in either of which cases the prisoner would be entitled to acquittal? or (b), Was the gun levelled by the prisoner at the deceased unnecessarily under the circumstances, but without the intention of discharging it, in which case it would be manslaughter.

The jury found the prisoner guilty of manslaughter; and being asked on what view of the case they found the verdict, they said, on account of the deceased following the prisoner to his house, and the gun being fired so shortly afterwards that it might have been done in self-defence, or might have gone off accidentally.

COCKBURN, C.J. explained to them that this was indeterminate,

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for that if it was fired in self-defence against serious violence intended by the deceased (a), he would be entitled to an absolute acquittal; and, repeating his direction, he desired them to reconsider their verdict, which they did.

The jury eventually returned this written finding: That the gun was levelled at the deceased unnecessarily under the circumstances, but without any intention of discharging it, and that it went off accidentally.

COCKBURN, C.J.—That would amount to a verdict of manslaughter. Do you intend that?

The jury.—Yes.

COCKBURN, C.J.—On the ground that though the prisoner had no intention of discharging the gun, yet that his levelling it at the deceased was, under the circumstances, unnecessary?

The jury.—Yes.

*Verdict—Guilty of manslaughter. Sentence—Six months' imprisonment with hard labour.*

(a) The direction was in writing, and, as here given, was copied from the writing. It was, therefore, carefully considered, and, on account of the experience of the Lord Chief Justice, is of importance. It must, however, be carefully understood as to the latter part of it with reference to such a state of facts as he supposed to exist, only a state of such extreme alarm arising from a sense of imminent danger to life, as quite deprived the prisoner of the power of reflection, and irresistibly—almost unconsciously—impelled him to pull the trigger. It must not be supposed that the Lord Chief Justice intended to lay down anything contrary to the law laid down in many cases—that even a blow in self-defence will not excuse or even reduce to manslaughter the instant recourse to deadly murderous violence causing death. Thus Parke, B.: “If a person receives a blow and immediately revenges it with any instrument that he may happen to have in his hand, the offence will only be manslaughter, provided the blow is to be attributed to the passion of anger arising from that provocation. But the law requires two things: that there should be that provocation, and that the fatal blow should be clearly traced to the influence of passion arising from that provocation. If you see that a person denotes by the manner in which he avenges a previous blow that he is not excited by a sudden transport of anger, but under the influence of that wicked disposition, that bad spirit which the law terms malice, in the definition of wilful murder, then the offence would not be manslaughter. And so if you find that before the stroke is given there is a determination to punish any man who gives a blow with such an instrument as the one which the prisoner used; because, if you are satisfied that before the blow was given the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving such a wound to the passion of anger excited by the blow, and no man who was under proper feelings, none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument:” (*Rex v. Thomas*, 7 C. & P. 818-19.) This, no doubt, was intended to be conveyed and implied in the direction with the present case, that if the prisoner intentionally fired the gun not from such alarm as suggested, but on account of ill-will, then the act was murder. The jury in their verdict negatived the state of alarm suggested, but also negatived intention, and found that the gun went off by accident.

## MIDLAND CIRCUIT.

## NOTTINGHAM WINTER ASSIZES.

*November, 1879.*

(Before Mr. Justice LUSH.)

REG. v. STAFFORD. (a)

*Winter Assize Acts, 1876 and 1877—Prisoner on bail—Not in custody at the time of holding of the assize—Right to be tried—Order in Council, 1879.*

*The Orders in Council, of Aug. 1879, made in pursuance of the Winter Assizes Acts, 1876 and 1877, declare which counties are to be united for the purpose of holding a Winter Assize, and in each instance enacts that, "Nothing in this Order shall authorise the trial or require the attendance at the said winter assizes for the said winter assize county of any prisoner who shall have been admitted to bail, and who shall not at the time of the holding of such winter assizes for the said winter assize county be in custody."*

*Held, that a prisoner who had been admitted to bail, and who surrendered after the opening of the commission, was not in custody "at the time of the holding of the assizes," and could not therefore be tried.*

*In order to entitle himself to be tried he should have surrendered before the opening of the commission.*

**T**HE PRISONER had been committed for trial on a charge of embezzlement. He had been liberated on bail, and now applied to have his trial taken at the present assizes.

The assizes were on this occasion held at Nottingham for the united counties of Nottingham and Lincoln, under the Winter Assizes Acts, 1876 (39 & 40 Vict. c. 57) (b) and 1877 (40 & 41

(a) Reported by GILBERT G. KENNEDY, Esq., Barrister-at-Law.

(b) The Winter Assizes Act, 1876 (39 & 40 Vict. c. 57), by sect. 2, enacts as follows: "Where it appears to Her Majesty that by reason of the small number of prisoners or otherwise it is usually inexpedient to hold separate winter assizes for any county, it shall be lawful for Her Majesty by Order in Council from time to time to provide in such manner and subject to such regulations as to Her Majesty may seem meet for all or any of the following matters:

(1) For uniting such county for the purpose of winter assizes to any neighbouring county or counties; and

(2) For the appointment of the place or places at which winter assizes are to be held for such united counties, with power to direct that they shall be held at different places in different years; and



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Vict. c. 46), and Orders in Council of the 14th day of August, 1879, duly issued in pursuance of these Acts, and published in the *London Gazette* of the 26th day of August, 1879.

The Order in Council was as follows :

The *London Gazette*,  
Tuesday, Aug. 26, 1879.

At the Court at Osborne House, Isle of Wight, the 14th day of Aug., 1879,

*Present—*

The Queen's Most Excellent Majesty in Council.

In pursuance of the Winter Assizes Acts, 1876 and 1877, Her Majesty is pleased, by and with the advice of Her Most Honourable Privy Council, to order as follows :

1. The County of Lincoln, the County of Nottingham, and the County of the City of Lincoln shall, for the purpose of the next Winter Assizes be united together and form one county, under the name of the Winter Assize County No. 4.

2. The said winter assizes for the said winter assize county shall be held at Nottingham.

After providing for the duties of the sheriffs, &c., the costs and expenses and other matters:

18. Nothing in this Order shall authorise the trial or require the attendance at the said winter assizes for the said winter assizes county [Nottingham and Lincoln] of any person who shall have been admitted to bail, and shall not at the time of the holding of such winter assizes for the said winter assize county be in custody, unless such person is jointly charged with another person in actual custody.

The commission day was fixed for the 6th day of November, and on the evening of the commission day, after the commission had been opened, the prisoner went to the governor of the gaol and offered to surrender to his bail. The gaoler declined to receive the prisoner into custody.

*Garrett*, at the sitting of the Court on the 7th day of November, the day on which the trials commenced, applied to have the case taken, stating that the prisoner wished to be tried.

LUSH, J.—I should be glad to accede to the application, but I do not consider I have any power to do so. Last night I was told by the governor of the gaol that the prisoner wished to

(3) For the jurisdiction of the court, and the attendance, jurisdiction, authority, and duty of sheriffs, gaolers, officers and jurors and persons. . . . ; and

(4) For any matters which appear to Her Majesty to be necessary or proper for carrying into effect an Order in Council under this Act.

An Order in Council purporting to be made in pursuance of this Act shall be deemed to be within the power of this Act, and shall while it is in force have effect as if it were enacted in this Act, and for all the purposes of the holding of the winter assizes the counties united by the order shall, subject to the provisions of the order, be deemed to be one county, and the winter assizes held in and for such united county shall be deemed also to be held in and for each of the constituent counties.

8. Her Majesty may from time to time by Order in Council revoke, alter, or add to any order made in pursuance of this Act.

Every Order in Council made in pursuance of this Act shall be published in the *London Gazette*, and laid before both Houses of Parliament within one month after it is made, if Parliament is then sitting, and if not, within one month after the then next meeting of Parliament.

surrender in order to take his trial, but I advised that unless he was in custody at the time of the opening of the commission he could not be tried at these assizes. His proper course would have been to have gone before a magistrate before the opening of the commission, and surrendered to his bail, and caused himself to be received into custody. The commission under which the present assizes are held is not for the county of Nottingham, but for the united counties of Nottingham and Lincoln; and it is issued under the Winter Assizes Acts and the special Orders in Council made in pursuance of those Acts. Had the commission been for the county of Nottingham alone it would have been exempt from the operation of this Order in Council, and would have been under the old practice, by which the judge could take the trial of a prisoner on bail.

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*Garrett.*—There is nothing in the Winter Assizes Acts to limit the power of the judge. The Order in Council does not prohibit the judge from trying a prisoner on bail; it merely does not authorise the judge to take the trial of a prisoner on bail, nor requires the attendance of such prisoner unless he chooses.

*LUSH, J.*—Such an interpretation would make the Order in Council unmeaning, as it would leave the law the same as before; and in no case could the judge proceed with the trial of a prisoner not in attendance. The former Order in Council (a) did not contain the words “shall require the attendance.” The word “authorise” appears to me to be against such a construction.

*Garrett.*—Those words may be treated as surplusage. But it is not necessary that the prisoner be in custody before the opening of the commission, the “time of holding of the assizes” is equivalent to “during the assizes.” The holding of the assizes is always treated as one continuous sitting, the sentence of a prisoner always dates from the first day of the assizes, so a surrender during the holding of the assizes would be treated as a surrender at the beginning of the assizes.

*Cassery,* for the prosecution, did not oppose the application.

*LUSH, J.*—I felt the difficulty of this Order in Council. Originally the winter assizes were held for separate counties, and then only in the case of counties where a certain number of prisoners were awaiting trial, and the judge was not required to take the trial of prisoners on bail unless they were jointly charged with other prisoners not on bail; it was within the discretion of the judge to take such trials or not. Then the Winter Assizes Acts were passed and counties were grouped together. The Order in Council under which the present winter assizes for these grouped counties are held states that “nothing shall authorise the

(a) The previous Order in Council of 23rd day of October, 1876, which was published in the *London Gazette* of the 27th day of October, 1876, was as follows: “Nothing in this order shall authorise the trial at the winter assizes for the said winter assize county [Nottingham and Lincoln] of any person who shall have been admitted to bail, and shall not at the time of holding of such winter assizes for the said winter assize county be in custody, unless such person is jointly charged with another person in actual custody.”

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trial or require the attendance of any person who shall have been admitted to bail, and shall not at the time of holding of such winter assizes be in custody." If those words meant "any person who shall not during the holding of such winter assizes be in custody," there would be no necessity for such enactment, because that was the old practice. I should be glad to comply with the application, but in my opinion the words "at the time of the holding of such winter assize" must be construed to be the time of opening of the commission, and as the prisoner was not in custody at that time I have no power to proceed with his trial.

Solicitor for the prosecution, *The Solicitor to the Treasury*.  
Solicitor for the defence, *George Belk*, of Nottingham.

[NOTE.—The prisoner was afterwards tried at the ensuing assizes, held at Nottingham, in Jan. 1880, and acquitted.]

## NORTH-EASTERN CIRCUIT.

DURHAM AUTUMN ASSIZES, 1879.

*Saturday, Nov. 1, 1879.*

(Before Mr. Justice BOWEN.)

REG. v. MILLER AND OTHERS. (a)

*Unlawfully wounding—Conviction for misdemeanour on trial for felony—14 & 15 Vict. c. 19, s. 5.*

*The statute 14 & 15 Vict. c. 19, s. 5, only applies where the indictment alleges a felonious cutting, stabbing, or wounding.*

*Upon an indictment charging a felonious shooting with intent to do grievous bodily harm, and doing grievous bodily harm with intent to do grievous bodily harm, it is not competent for the jury to convict of unlawfully wounding.*

JOHN MILLER, shooting gallery proprietor, Thomas Fordy, Michael Handley, and John Kelly, were charged with feloniously shooting at William Hogarth with intent to do him grievous bodily harm. The indictment further charged them with doing grievous bodily harm to the said William Hogarth with intent to do grievous bodily harm.

(a) Reported by RICHARD LUCK, Esq., Barrister-at-Law.

*T. O. Granger* prosecuted.

*J. L. Walton* defended Miller.

According to the case for the prosecution, late on Saturday night, after the public-houses had been closed, a large crowd was assembled outside Miller's shooting gallery. The police dispersed the crowd, and the prosecutor and his brother, who were in company with a man called Graham, went away. Graham remained behind, and became engaged in a fight with one of the prisoners. Miller urged him to go away. Graham still refused, and one of the prisoners threatened to shoot him if he did not go away. Graham dared him to do so, and made a snatch at the rifle which was pointed at him. The rifle (which apparently was not loaded with ball) was discharged, and the powder scorched him on the forehead. Miller then closed with him, and he was thrown to the ground. The prosecutor and his brother returned to the rescue, and were taking him away, when first the brother, and then the prosecutor, were shot down in quick succession at a distance of eight or nine yards from the van. They were carried home, and their wounds dressed, and the prosecutor was found to be suffering from two bullet wounds in the back, neither of which, however, were dangerous.

The prisoners were apprehended next morning, and upon being charged, Miller said, "We were bound to shoot to frighten the men, or they would have killed us, and broken the van in with stones. I did not expect that there was anything but powder in the rifles."

Fordy said, "I shot in self-defence. The men were throwing stones at the van."

Handley said, "I fired, but I did not expect there was anything but powder in the rifles."

Kelly said, "Yes, sir, I fired also."

For the defence a witness was called, who stated that the crowd attacked Miller and his van with stones; that Miller besought them to go away; and that the rifles were discharged in the air, simply to frighten away the crowd.

BOWEN, J., directed the jury that, if the prisoners knew the rifles were loaded, and fired with the intention of hitting, they would be guilty of the felony; if they fired recklessly, knowing the rifles were loaded, but without the intention of hitting, then they would be guilty of unlawfully wounding; and if they fired in the air, not knowing the rifles were loaded, simply to frighten away the crowd, then they must be acquitted altogether.

The jury found the prisoners guilty of unlawfully wounding under great provocation.

*J. L. Walton* submitted that upon the indictment presented to the jury it was not competent for them to find a verdict of unlawfully wounding. There was no charge of cutting, stabbing, or wounding alleged in the indictment, and the statute of 14 & 15 Vict. c. 19, s. 5, which, in certain cases, enabled a jury to convict for misdemeanour on a trial for felony, did not apply.

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The words of the statute were as follows: "If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanour of cutting, stabbing or wounding." The defendants were simply charged with the felonious shooting, and with doing grievous bodily harm with intent to do grievous bodily harm, and nowhere was it alleged in the indictment that they had cut, stabbed, or wounded any person. The jury had found the prisoners not guilty of the felony with which they were charged in the indictment, and they must be acquitted.

BOWEN, J. (after looking at the indictment) observed that it appeared to him to be so framed as to omit the real charge of which, in his opinion, the prisoners were guilty; he would take time to consider.

Nov. 3.—BOWEN, J., addressing the prisoners, said:—The jury have found you not guilty of the offence with which you were charged in the indictment, but have found you guilty of unlawfully wounding. It has been submitted to me by your counsel that, upon this indictment, it is not competent for the jury to find you guilty of unlawfully wounding, since it is not alleged in the indictment preferred against you, that you did cut, stab, or wound the prosecutor. I have carefully considered the point, and I think that it is so, and you must all be discharged.

*Discharged accordingly.*

## QUEEN'S BENCH DIVISION.

*November 19 and 20.*

(Before COCKBURN, L.C.J., LUSH and MANISTY, J.J.)

REG. v. SIR R. CARDEN. (a)

*Libel—Criminal information before justice—Evidence of truth of libel—Lord Campbell's Act (6 & 7 Vict. c. 96, sects. 4, 5, 6)—Russell Gurney's Act (30 & 31 Vict. c. 35).*

*Upon the hearing of a criminal information for libel under sect. 5 of Lord Campbell's Act, a magistrate upon the preliminary inquiry has no jurisdiction to hear evidence relating to the truth of the libel, or to any other justification. If publication of the libel is proved he is bound to commit.*

*A. was summoned before a magistrate for having unlawfully and maliciously published a defamatory libel of and concerning one B. When before the magistrate, A. proposed to prove the truth of all the averments contained in the libel, not only by cross-examination of the prosecutor, but by calling evidence in support of the truth of the entire libel.*

*Held, that the magistrate had no jurisdiction to determine whether the libel was true or not, as the defence of the truth of the libel could only be raised under Lord Campbell's Act, and under the conditions imposed by that Act; and that before evidence of the truth of a libel can be taken there must be an indictment and a plea to it such as to satisfy the exigency of the statute.*

*Reg. v. Townsend (10 Cox C. C. 356; 4 F. & F. 1089) followed.*

**T**HIS was a rule *nisi*, calling upon Sir Robert Carden, an alderman and magistrate of the city of London, and Edward Lawson Levy, the prosecutor, to show cause why a *mandamus* should not issue commanding Sir R. Carden to receive certain evidence in cross-examination of the prosecutor and of his witnesses on the hearing of a certain information or complaint for libel preferred by Edward Levy Lawson against Henry Labouchere and Charles Wyman and another.

The information charged the publication by the defendants of a defamatory libel under the 6 & 7 Vict. c. 96, s. 5, and not of maliciously publishing a defamatory libel, knowing the same to be false, under sect. 4.

(a) Reported by A. H. POYNER, Esq., Barrister-at-Law.



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The libel was published in a newspaper called *Truth*, of which the defendant Labouchere was the proprietor, and the other defendants, Wyman and another, the printers. The libel related to the conduct of the prosecutor in the management of the *Daily Telegraph* newspaper, of which the prosecutor was a proprietor, and among other things described him as “a disgrace to journalism.” The defendant Labouchere proposed to justify this by calling evidence. Upon objection being made, the magistrate refused to admit such evidence, and adjourned the hearing in order that the correctness of his ruling might be determined by this court.

The rule was granted on the ground that the proposed evidence tended to prove—first, that the said alleged libel was not a false and defamatory libel; secondly, that it was a fair commentary on a public man in a matter to which he had given public prominence, and which excited public interest; thirdly, that the alleged libel was true in substance and in fact; fourthly, that it was for the public benefit the alleged libel should be published; fifthly, that it was not published with a knowledge that it was false.

It was stated by Sir R. Carden on affidavit—

“1. That Henry Labouchere was summoned before me to answer a charge of having unlawfully and maliciously published a defamatory libel of and concerning one Edward Levy Lawson, such libel being contained in the number of a journal called *Truth*, bearing date the 9th day of October, 1879.

“2. Her Majesty’s Attorney-General, who appeared with Mr. Poland to conduct the prosecution, having opened matters other than the publication of the said libel, viz., questions of fact contained in the said libel, and examined the prosecutor upon those matters, I allowed the said Henry Labouchere to cross-examine the plaintiff fully on those matters.

“4. When the court met on the 31st day of October Mr. Wildey Wright, who appeared as counsel for the printer of *Truth*, insisted upon his right, and that of the said Henry Labouchere, to prove the truth of all the averments contained in the libel, not only by cross-examination of the prosecutor, but by calling evidence in support of the truth of the entire libel. The counsel for the prosecution having objected, I ruled that, as in the case of *Reg. v. Townsend* it had been laid down as law that the defendant in a charge of publishing a defamatory libel is not entitled to give evidence of the truth of the libel before the magistrate, and as that case had not been overruled by *Ellissen v. The Lord Mayor of London*, that the question how much evidence I would receive on the part of the defence on the averments of the libel was entirely a matter within my discretion.”

By Lord Campbell’s Act (6 & 7 Vict. c. 96) :

Sect. 4. And be it enacted that if any person shall maliciously publish any defamatory libel knowing the same to be false, every such person being convicted thereof shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the court shall award.

Sect. 5. And be it enacted that if any person shall maliciously publish any defamatory libel, every such person being convicted thereof shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year.

Sect. 6. And be it enacted that on the trial of any indictment or information for a defamatory libel the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence unless it was for the public benefit that the said matters charged should be published, and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant in pleading to the said indictment or information to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or information it shall be competent to the court in pronouncing sentence to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove and disprove the same: Provided always that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: Provided also that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty: Provided also that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel.

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By Russell Gurney's Act (30 & 31 Vict. c. 35), s. 3:

And whereas complaint is frequently made by persons charged with indictable offences upon their trial, that they are unable, by reason of their poverty to call witnesses on their behalf, and that injustice is thereby occasioned to them, and it is expedient to remove as far as practicable all just ground for such complaint. Therefore, in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence . . . such justice or justices before he or they shall commit such accused person for trial, or admit him to bail shall, immediately after obeying the directions of sect. 18 of 11 & 12 Vict. c. 42, demand and inquire of the accused person whether he desires to call any witnesses; and if the accused person shall, in answer to such demand, call or desire to call any witness or witnesses such justice or justices shall, in the presence of such accused person, take the statement upon oath or affirmation, both examination and cross-examination, of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing. . . .

The *Attorney-General* (Sir J. Holker, Q.C.), the *Solicitor-General* (Sir H. Giffard, Q.C.), *Serjt. Ballantine*, and *Poland* showed cause against the rule.—The Court is asked to exercise its mandatory power over a magistrate while he is proceeding in the course of his jurisdiction, which this Court does not do. It is impossible for the Court to lay down, under the circumstances, what evidence the magistrate is to receive, what to reject, and what weight is to be attached to the evidence. The important question here is, Is the magistrate, upon a charge of libel under the 5th section of Lord Campbell's Act, bound to receive evidence to show that the libel was true, or that it was published in the public interest? The whole question turns upon the construction of two statutes—Lord Campbell's Act (6 & 7 Vict. c. 96) and Russell Gurney's Act (30 & 31 Vict. c. 35). Before the first of these Acts was passed a man was not allowed in criminal proceedings to prove the truth of a libel. By

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sect. 6 of that statute the truth of the libel may be pleaded to the indictment, but the magistrate in the preliminary inquiry cannot entertain it, and as it is not then material false swearing in respect of it would not be perjury: (*Reg. v. Townsend* (4 F. & F. 1089; 10 Cox C. C. 356.) The Legislature decided, as was said by Lord Campbell in *Reg. v. Newman* (3 C. & K. 252; 1 El. & Bl. 268; Dears. C. C. 85), that "subject to certain modifications and guards, defendants in criminal proceedings should be allowed to prove the truth of a libel. The modification provided by sect. 6 of the Act was that there should be a plea of the truth of the libel, and that it was for the benefit of the public that it was published. That plea could be dealt with by the Court, and if irrelevant matter were introduced it could be struck out upon demurrer. Otherwise great inconvenience would arise; a defendant might bring forward a hundred different things, each apparently irrelevant, on the allegation that all put together, after an endless inquiry, would form a justification. A magistrate might be occupied many days in this way if the contention of the other side is correct, and yet after all no plea of justification may be put upon the record. If the charge here had been under the 4th section of Lord Campbell's Act the case would have been different, and *The Mayor of London v. Ellissen* would have been an authority in point. Under Jarvis's Act (11 & 12 Vict. c. 42), sect. 17, the prosecutor was at liberty to call witnesses as "to the facts and circumstances of the case," but these are facts material to the issue, and the issue is here whether the accused shall be committed and held to bail. The object of Russell Gurney's Act is only to enable poor persons accused of offences before the magistrates to get their witnesses bound over to appear at sessions and assizes when otherwise they would not have been able, owing to their poverty, to secure such evidence. It is clear from the wording of the Act that this was to take place after the magistrate had made up his mind to commit. The object of the Act was not, as the defendant had put it, to perpetuate the testimony given before the justices—nothing of the kind is ever mentioned or even suggested in the Act. It is true that owing to some misunderstanding Mr. Folkard, the editor of Starkie on Slander and Libel, p. 592, 4th edit., states that "since this decision (*Ellissen v. Mayor of London*) it has been the practice for the committing magistrate to take the depositions of any witnesses tendered on the part of the defendant, whether in support of the justification or in denial of the publication." The learned author did not sufficiently distinguish between a charge brought under the 4th section of Lord Campbell's Act and a charge brought under the 5th section, but upon comparing the two the distinction at once appears. On these grounds this rule should be discharged.

*Gorst*, Q.C. and *Brooke Little*, for Sir R. Carden, did not argue.

*O. Russell*, Q.C., *Willey Wright*, and *Macdonnell* in support of the rule.—In declining to hear the evidence for the defence the

magistrate has virtually declined to hear the case. The defendants, therefore, are entitled to a *mandamus* to compel him to hear the case. Precisely the same course was taken in *Ellissen v. Mayor of London*, which must be taken to have overruled *Reg. v. Townsend (ubi sup.)*. Although the information does not charge the defendants with knowing that the libel was false under sect. 4, this makes no difference, as a count may be added to the indictment under sect. 4. The magistrate was bound to hear any evidence tendered with regard to the facts and circumstances of the case, and that would extend to the truth of the libel when urged as a justification. Truth was before Lord Campbell's Act a defence at common law even in a criminal charge, a fact that was stated by the Criminal Law Commissioners in their report in 1833. The first statute relating to the duties of the magistrate is 2 & 3 P. & M. c. 13. There it was enacted that the magistrate was to take the examination of the accused, and of the witnesses as to the offence, and the facts and circumstances of the case. The duty there extended not only to the offence, but to the facts and circumstances of the case as well. This view was supported by the decision of Fortescue, J. in *Rex v. Darby* (Fortescue's Rep. 143). Again, under Peel's Act (7 Geo. 4, c. 64), the magistrates were even in cases of felony to hear evidence on both sides. [COCKBURN, C.J.—That must be taken with the limitation that the evidence has reference to the question with which the magistrate has to deal—*i.e.*, whether the accused should be sent for trial.] We contend that all the evidence should be heard. Russell Gurney's Act (30 & 31 Vict. c. 35, s. 3) gives this right; the accused may call any witnesses who are cognisant of the facts or circumstances of the case, or of any fact tending to prove the innocence of the accused—the facts and circumstances there spoken of must be those in favour of the accused, as well as those in favour of the prosecution. It may be of the utmost importance that this evidence should be taken, as at the trial the defendant may not be able to get it, for the prosecutor or one or more of the witnesses might be absent, and, although the magistrate might not be able to determine as to the truth of the libel, still he might hear evidence on the point which would be useful when the case was tried.

COCKBURN, C.J.—This case, no doubt, is one of considerable importance; but it is so clear to my mind that we ought not to hesitate in at once discharging the rule. The application for a *mandamus* was one of a startling character. We have certainly jurisdiction where a magistrate has authority to hear and determine a matter and declines to exercise his jurisdiction, by the exercise of our mandatory authority to direct him to hear and determine. But here the whole case is under prosecution and is in course of hearing, and we are asked to interfere and direct the magistrate as to the course he is to pursue. But, although we have authority to grant a *mandamus* to the magistrate to hear and determine, we have no authority to control the magistrate in

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the conduct of the case, or to prescribe to him what evidence he shall receive or reject. It is a very anomalous proceeding to grant a *mandamus* while the case is still under discussion. We are not called upon to exercise an appellate jurisdiction—that can only be exercised after the case has come to an end. We are not here exercising such a jurisdiction. We are called upon to issue a *mandamus* to the magistrate to direct him to take a certain course while the case is pending. There is, no doubt, the case of the *Mayor of London v. Ellissen* to show that where the magistrate declines to exercise jurisdiction which he possesses, and so obstructs the course of justice, this Court will interfere, on the ground that he has not “heard and determined the case” in the proper legal sense of the phrase. In that case I think we went to the utmost limits of our mandatory jurisdiction, and I should be unwilling to extend the principle to any case not clearly within it. But it is said that the magistrate in the present case declined to exercise jurisdiction, and that involves the question whether he had jurisdiction to receive this evidence. In my opinion he had not. Let us see, first, what is the duty and province of the magistrate when a party is brought before him for the purpose of being committed or held to bail on a particular charge. The duty of the magistrate is to determine on the hearing of the evidence for the prosecution, and if evidence is adduced on the part of the defence, then after hearing and considering the whole evidence to decide whether there is a case on which the accused ought to be sent to trial. It is no part of his duty or his province to try the case; he is only to say whether there is a fit case on which to put the accused on his trial. In my opinion, unless some statutory duty is imposed upon the magistrate, the evidence before him must be confined to that which is the question in issue before him, and if he exceeds the limits of that inquiry he exceeds his jurisdiction. Now, here the charge is one of libel. What is it that the magistrate had to inquire into? First, he had to see whether the written matter was in point of law on the face of it a libel; and, secondly, whether the publication was so far brought home to the accused that he ought to be committed for trial. It is said it was incumbent upon the magistrate to receive evidence to show the truth of that which is complained of as libellous. I meet that proposition with a direct negative. By the common law of England, independently of any statutory enactment found in Lord Campbell’s Act, the law as it was settled prior to that Act, and as it remains still, apart from that Act, whatever it may have been in ancient times, the truth was not a defence to a criminal charge of libel. It therefore can only become a defence under the statute, and it became a defence under that Act only on certain statutory conditions, which must be complied with. The magistrate, independently of the statute, clearly could not have received the evidence unless it was made obligatory upon him to do so for some collateral purpose under Russell Gurney’s Act. By the common law, independently of



statute, the magistrate could not enter into the inquiry. \* But, then, Lord Campbell's Act introduced a great and important alteration and innovation in our law, enabling the accused to plead and enter into an inquiry as to the truth of the libel. But under that Act that defence does not arise at this stage, and it cannot, therefore, be insisted on before the magistrate. Suppose the accused had succeeded in fully showing the truth of the libel, what would have been the duty of the magistrate? He would have been obliged to commit or to hold him to bail, because the matter could not have been gone into at that time, and could only be used for the purpose of defence when the statutory conditions had been complied with, and they cannot be complied with at this stage of the inquiry. There must first be a commitment or holding to bail upon the charge, and then an indictment found, and then a plea to it such as will satisfy the exigency of the statute, for until there is such a plea upon the record no defence can be rested on the ground of truth. How, then, can the magistrate enter into that inquiry, seeing that if the truth be established to the utmost extent desired, still he must commit, supposing there is a libel and that the publication of it is sufficiently brought home to the accused? To me, it is abundantly clear that any inquiry into the truth of the libellous matter goes beyond the province of the magistrate, and is wholly irrelevant to the only inquiry it is competent to him to enter into—that is, to examine whether, apart from the statutory defence, which can only be raised at an ulterior stage of the proceedings the case is sufficiently brought home to the accused. In my view the jurisdiction of the magistrate is confined to the inquiry whether or not, on a proper view of the whole evidence the case is one which he ought to send to trial. If the case is one which he is bound to send to trial, and the defence is one which cannot be raised till after the commitment, and after an indictment and upon plea properly pleaded, it is clear that, as the defendant has only a right to give evidence having reference to the issue before the magistrate, the magistrate would be bound to reject evidence going beyond it, and is, therefore, right in refusing to hear such evidence. But then it is said that though the evidence of the truth of the matters in the libel would not be available before the magistrate with a view to induce him to decline to commit the defendant, it may yet be received with a view to its being available for a collateral purpose, that is for the perpetuation of testimony. But, looking to the statutes, I find no reference to the perpetuation of evidence as the object, though, incidentally, the perpetuation of the evidence is a great advantage that arises from the procedure established as to the taking of evidence, but it is not the only one, for other important advantages result from the procedure. In the first place, those who have to frame the indictments have before them the evidence contained in the depositions, and are thus enabled to adapt the indictment to the precise circumstances of the case. Then the

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judge has the advantage, before he hears the evidence at the trial, of making himself familiar with the facts and circumstances of the case. Again, if there is any material discrepancy between the statements of the witnesses at the trial and the statements which they made before the magistrate, the discrepancy may be pointed out, and so the evidence may be shaken. Lastly, there is the very important advantage that, if the witness who has given his evidence dies or is too ill to attend the trial, then his testimony may be used in the form of the written deposition. But all this is only incidental to the mode of proceeding, and I find nothing in the statute which warrants the conclusion, that because of these advantages the magistrate can exceed the limits and bounds of his proper jurisdiction and enter into an inquiry which is beyond the question whether he should commit or hold to bail. I see nothing in the statute which warrants any such inference. Then it is said that the proposed evidence was receivable to show that the alleged libel was only comment on the acts and conduct of a public man. The fallacy of such an argument is so transparent that it is hardly worth while to expose its error. It is true that if the comments are on certain facts not in themselves libellous—the comments which might otherwise be libellous may assume a privileged character, being founded upon facts not in themselves libellous, and the party to whom they refer being a public man. Suppose a person states a series of facts true in themselves, or not libellous, of a public man who stands as a candidate before a constituency, and on them founds a charge or comment that the man is a dishonest politician and not fit to be trusted with the confidence of a constituency; though the comment may in itself be unjust and libellous, yet the facts on which it is founded, not being libellous, it would be privileged if not malicious, being made upon a man in his public capacity. But take the converse case—that the defendant first libels a man and then comments upon it. Surely to enunciate such a proposition is to expose its transparent absurdity. To say that a man is a murderer cannot be justifiable as comment; it is not comment, but fact. The fallacy is in confounding matter of fact with matter of comment. Here it is said Mr. Lawson is so and so, and therefore is a “disgrace to journalism.” It may be that you might say that as matter of comment; but you cannot justify a statement by way of comment of a series of facts which are libels. It is possible that comment made upon a public man may escape the consequences of libel: but you must either have facts not libellous or you must be prepared to prove their truth. Here the facts stated are clearly libellous unless the truth of them can be proved; but the difficulty is that the truth cannot be proved until a later stage of the proceedings. That argument is decisive, and in whatever view the case is looked at, the same conclusion is arrived at—that this defence is not admissible before the magistrate. There is only one ground on which the admissibility of such evidence can be urged, and that is that at

the trial the defendant may desire to call the prosecutor to prove the defence, and he may be absent, and so the defendant might be deprived of the benefit of his cross-examination. But that is very remote. If after the indictment is found Mr. Labouchere pleads that which he has alleged, then the whole of the evidence will be admissible, and the danger referred to is so remote that it would be dangerous to extend the statute beyond the limits I have described. Suppose Mr. Labouchere were to say, "I cannot dispute that it is your duty to commit me, still I desire to give evidence for the purpose of perpetuating it—evidence of provocation"—would it have been admissible? Would it have been within the province of the magistrate? I say emphatically that it would not, because it was not within the province of the magistrate, which was to decide whether Mr. Labouchere should be committed or held to bail. It was urged that it was the magistrate's duty to take the evidence in order to perpetuate it if at any time it might have any possible relevancy. But it seems to me that the magistrate, in taking such evidence, would be transgressing the bounds of his jurisdiction. With the view of seeing what is the proper construction of the Act, it is important to see how far the principle might be carried. I apprehend that the magistrate could not receive evidence which did not go to the issue before him—evidence collateral to the exercise of his jurisdiction. Upon these grounds I am of opinion that this rule must be discharged.

LUSH, J.—The arguments on the part of the defendant raise two distinct questions—one general, the other secondary and subordinate. The first is one of great and general importance, as it affects the exercise of magisterial jurisdiction in hearing criminal charges and dealing with persons who come before them on such charges. The contention of the defendant is that the person accused has the right to require the magistrate to receive evidence which may be serviceable to the accused on his trial, although it has no tendency to disprove his guilt, and only, perhaps, goes to mitigate his punishment, in order to perpetuate that evidence. As far as my experience goes, this is the first time such a proposition has ever been advanced, and I can find no authority which gives the slightest sanction to it. The argument in support of it was based on a phrase originally introduced in the Act of Philip and Mary as to taking examinations, and carried into all the later Acts—the 7 Geo. 4, c. 64, Jervis's Act, and Russell Gurney's Acts—"evidence as to the facts and circumstances of the case." But in the first Act (2 & 3 P. & M. c. 13, s. 2) the enactment was that the magistrate "should take the examination of such prisoner and information of those that bring him, of the fact and circumstance thereof, and the same or so much thereof as shall be material to prove the felony shall be put into writing." That clearly shows that the magistrate is to put into writing only so much as is material to prove the charge. That Act related only to cases of felony, and later Acts extended

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it to other offences. Then the first of Peel's Acts (7 Geo. 4, c. 64, s. 2) took up the same language, and provided that the magistrate was "to take down in writing the information of those who shall know the facts and circumstances of the case, or so much thereof as may be material," that is, material to prove the charge. Then Jervis's Act (11 & 12 Vict. c. 42, s. 17) uses the same language, providing that the magistrates is to take the evidence of those who know the facts and circumstances of the case and put it into writing. There the word "material" is not used, but as it had been always used before, Jervis's Act meant the same thing. Then came Mr. Russell Gurney's Act, which for the first time provided for the taking of evidence for the defence. It was argued that as this was for the benefit of the accused, it applied to any evidence that might be for his benefit. But the object was to enable poor prisoners to produce their witnesses at the trial, to have them bound over instead of being obliged to subpoena them; it recited that as the object, and sect. 3 enacted: "That in all cases the justices shall, before they commit the accused, ask whether he desires to call witnesses; and if he should say that he does, then they shall take their evidence of what they know relating to the facts and circumstances of the case, or anything tending to prove the innocence of the accused party, and shall put it into writing." "And such witnesses, not being witnesses only to character, as shall, in the opinion of the justices, give evidence in any way material to the case, or tending to prove the innocence of the accused, shall be bound over." Now, if the evidence was to be taken, although it only went to mitigate the punishment, for the sake of perpetuating it, why the exception of witnesses only to character? The evidence must be either material to the case or tending to prove the innocence of the accused: as to prove him innocent altogether, or to reduce the offence from murder to manslaughter, or from robbery with violence to robbery without violence, or from wounding with intent to do grievous injury to mere unlawful wounding. Under this enactment the accused has a right to adduce evidence to reduce his offence as well as to prove his innocence. But the evidence before the magistrate is to be confined either to prove his innocence altogether or to reduce his guilt. Then, as to the object being to perpetuate testimony, that is not the object of the Act; the object was to require the depositions to be put in writing for the information of the prisoner and of the judge; and the language of the Act includes no evidence before the magistrate which has not a tendency to prove the defendant not guilty or to reduce his offence. So much for the general question. Then comes the subordinate question—whether the magistrate was right in refusing to receive the evidence which was offered for the purpose of proving the truth of the alleged libel. Upon the affidavits I think that was the only object for which the evidence was tendered, that was the point decided by the Alderman and



the point now to be decided by us—whether evidence was admissible to prove the truth of the libel. I think it was not. Beyond all doubt, at common law, before Lord Campbell's Act, whatever may have been the law centuries ago, the truth of the libel was no defence on a criminal charge. Lord Campbell's Act made an alteration in the law so far as to allow such evidence, provided the truth were pleaded and provided it was for the public benefit; and that is the only defence to be allowed on a charge of simple libel. It is said that the prosecutor might in his indictment include a charge of libel known to be false; and it is unfortunately true, as it is also true that he might prefer an indictment without going before a magistrate at all. If the charge were of a libel knowing it to be false, then evidence before the magistrate might be received to show that the defendant did not know it to be false. But then it would not prove his innocence, though it would reduce his offence, and so would be material to the case, and the magistrate must still commit the accused for trial. Inasmuch then, as the evidence is only admissible under Lord Campbell's Act, it cannot be admissible on the preliminary inquiry, when it is doubtful whether the defendant will plead the truth or not, and it is uncertain whether he will be able to state facts showing that the publication was for the public benefit; so that the magistrate has no jurisdiction to enter into the inquiry. As to the two cases which have been cited, they are distinguishable. Both cases appear to me to have been well decided. One was a case of simply publishing a libel, the other of publishing a libel knowing it to be false. In the latter it was competent to get rid of the major charge by proving the truth of the libel. For these reasons I think the rule should be discharged.

MANISTY, J.—I am of the same opinion. It might be thought the case was so clear that it might have been disposed of on the original application for a rule. I think it right to say that it was not on account of any doubt in my mind or in that of my brother Field that we granted the rule *nisi*; but on account of the great importance of the case, and that it might undergo full discussion. I agree entirely in the exhaustive judgments that have been given. It is quite sufficient for me to ground my judgment on the statute itself—Lord Campbell's Act—which affords an entire answer to this application. It cannot be doubted that if that Act had not passed, the magistrate would have had no jurisdiction to enter into the question of the truth or falsehood of the alleged libel, and, therefore, the magistrate on the preliminary inquiry could not inquire into the truth, for if he did, the evidence would be irrelevant, the depositions would be waste paper, and the witnesses could not be indicted for perjury. So to require the magistrate to take that evidence would be a mockery. Lord Campbell's Act has made no change in that respect. It was said that the evidence might be available in mitigation of punishment, but it is clear that it could not be used

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at any time whether for that purpose or any other, for it was held in Sir F. Burdett's case (4 B. & Ald. 314) that the truth of the libel could not be shown on affidavit, even in mitigation of punishment, although a belief in it might be shown. Under Lord Campbell's Act, the truth can only be shown on a plea alleging that it was for the public benefit, that the matters charged should be published. In this case the inquiry has not arrived at the stage at which such a plea can be pleaded, and therefore the truth of the libel cannot as yet be received in evidence. It was also urged that the evidence was receivable to show that the libel was by way of comment on the conduct of a public man; but the very libel shows on its face that it is not so, as it consists of abuse and vituperation, which could not be regarded as "fair comment" on the conduct of any man. And I think it would be wrong that we should grant a *mandamus* to the magistrate to receive evidence to contradict that which is manifest on the face of the libel would bring scandal on this high prerogative writ. The rule therefore must be discharged.

*Rule discharged with costs.*

Solicitor for the prosecutor, *T. A. Cox.*

Solicitors for the defendant, *Lewis and Lewis.*

Solicitor for Sir R. Carden, *The City Solicitor.*

## CROWN CASES RESERVED.

*Saturday, November 22, 1879.*

(Before COCKBURN, C.J., HUDDLESTON, B., LINDLEY, MANISTY,  
and HAWKINS, JJ.)

REG. v. FULLAGAR. (a)

*Larceny Act—Fraudulent appropriation of trust money by solicitor  
—Direction in writing to apply money — Intrusted with  
"property" for safe custody—24 & 25 Vict. c. 95, ss. 75, 76.*

*Trust money had been invested on mortgage. The mortgage was  
paid off, and the money left in the hands of the family solicitor,  
who wrote to the person beneficially interested: "R.'s money  
was paid on Saturday, the 6th day of April—2500l. and interest.  
. . . . Let me know how you would like to have the 2500l.  
invested, whether in the funds or on mortgage. I can get you 4  
per cent. on a good security, but not more. More than 4 per*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

*cent. is not to be obtained upon such securities as trustees would be justified in investing."* The answer was dated the 9th day of April: "Will consult O. at once about the money, and let you know. I do not wish it placed in the funds. I am very glad it is paid over, and hope it will be well secured this time." At or very near the date of these letters it was clear that the money had been fraudulently appropriated to his own use by the solicitor.

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Fraudulent  
appropriation  
of money by  
solicitor.

*Held, that this was a fraudulent conversion to his own use of property intrusted to the solicitor for safe custody within sect. 76 of 24 & 25 Vict. c. 95.*

*Quære, whether the above letters amounted to a direction in writing to apply the money within sect. 75.*

CASE reserved for the opinion of this Court by Cockburn, C.J.

Lewis Greene Fullagar, a solicitor, was tried before me at the late assizes for the Winter Assize County No. 10, as appointed under an Order in Council of the 14th day of August, 1879, on an indictment framed under 24 & 25 Vict. c. 96, ss. 75 & 76, which charged, in a variety of forms, that, being the attorney and agent, and, having been by her intrusted with a sum of 2500*l.* to be invested on mortgage and for safe custody for the benefit of the persons interested in the same, he had fraudulently converted the money to his own use.

It is unnecessary to set out the indictment, which was of great length and prolixity. It may be taken that it set out the offence in every form. The only counts that need now be referred to are the 22nd and 23rd counts.

22nd count: And the jurors aforesaid upon their oath aforesaid do further present that the said Lewis Greene Fullagar heretofore, to wit, on the 6th day of April, 1872, being an attorney and agent of the said Mary Mockett, and being solely intrusted by her with certain property, to wit, the sum of 2500*l.* of the moneys of the said Mary Mockett, for safe custody, did afterwards, to wit, on the said 6th day of April, A.D. 1872, at the parish aforesaid, in the county and winter assize county aforesaid, unlawfully, and with intent to defraud, convert, and appropriate the said sum of money to his own use and benefit, then being money of the said Mary Mockett, against the form of the statute in such case made and provided, and against the peace of our said lady, the Queen, her crown and dignity.

23rd count: And the jurors aforesaid upon their oath aforesaid do further present that the said Lewis Greene Fullagar heretofore, to wit, on the 6th day of April, 1872, being an attorney and agent of the said Mary Mockett, James Walker Body, and Stephen Goldsmith, and being intrusted by them with certain of their property, to wit, the sum of 2500*l.* of the moneys of the said Mary Mockett, James Walker Body, and Stephen Goldsmith, for safe custody, afterwards, to wit, on the said 6th day of April, in the year aforesaid, at the parish aforesaid, in the county and winter assize county

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aforesaid, unlawfully, and with intent to defraud, did convert and appropriate to his own use and benefit the said last-mentioned sum of money, then being the property of the said Mary Mockett, James Walker Body, and Stephen Goldsmith, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her crown and dignity.

The only question to be considered is whether, upon the facts, the case came within the statute.

That the defendant had been intrusted with the money, and that he had fraudulently converted it to his own use, having, on his own admission, speculated with it, and lost it, was undoubted. But it becomes necessary to call attention to the manner in which the money first came into the hands of the defendant, and under what circumstances he disposed of it.

The money in question being part of the residuary estate of one William Martin, the father of the prosecutrix, had been bequeathed by him to trustees, and had been invested on mortgage; but the mortgage having been paid off by the mortgagor, the money had come into the hands of the defendant as the family solicitor and solicitor to the trust.

On receipt of the money, defendant wrote to the prosecutrix as follows :

Lewes, 8th April, 1872.

Dear Madam,—Mr. Ridge's money was paid on Saturday last, 6th April—2500*l*. and interest. I inclose a cheque for 97*l*. 18*s*. 4*d*., thus :—

One year's interest due 6th April	...	...	...	...	£100	0	0
less income tax	...	...	...	...	2	10	0
							<hr/>
					97	10	0
Error in former payments	...	...	...	...	0	8	4
							<hr/>
					£97	18	4

Let me know how you would like to have the 2500*l*. invested. Whether in the funds or on mortgage. I can get you 4 per cent. on a good security, but not more. More than 4 per cent. is not to be obtained upon such securities as trustees would be justified in investing.

Yours faithfully, LEWIS G. FULLAGAR.

Mrs. Mockett, Arlington.

To which letter Mrs. Mockett sent the following reply :

Grelhill's Farm, Arlington, 9th April, 1872.

L. G. Fullagar, Esq.

Sir,—The cheque 97*l*. 18*s*. 4*d*. came safe to hand this morning, for which I am obliged. Will consult Mr. Goldsmith at once about the money, and let you know. I do not wish it placed in the funds. I am very glad it is paid over, and hope it will be well secured this time.

Yours respectfully, MARY MCKETT.

The Mr. Goldsmith here referred to was till his death a trustee under the will, and a confidential friend of the prosecutrix, who had a beneficial interest, that is to say, a life estate, in the fund.

About a week or two later Mrs. Mockett saw the defendant at his office at Lewes, when he told her that he had placed the money on mortgage on a large estate at Worth, on a first mortgage; representing, in answer to a question put by her, that a deed which was lying on the table, but which she did not further look at, was the mortgage deed. All this was wholly untrue; and the

money, as has already been stated, was applied by the defendant to his own purposes.

He paid the interest regularly from April, 1872, when the money came into his hands, till October, 1878, making from time to time excuses for not producing the mortgage deed, which was repeatedly asked for, till at last, another solicitor having been employed, and an order of a Court of Equity obtained for the delivery of the deeds, the defendant confessed the real state of the facts, and acknowledged that he had made away with the money.

Of the moral guilt of the defendant there could be no doubt; and I therefore directed a verdict of guilty, and sentenced the defendant to five years' penal servitude; but, as I doubted whether, upon these facts, the case came within the first enactment of the statute (sect. 75) by reason of the absence of any affirmative written direction as to the application of the money, or within the second (sect. 76), by reason of the latter being, as I thought, applicable to securities alone and not to money, I respite execution of the sentence in order to take the opinion of this Court as to whether the defendant could be held guilty under the statute in question.

A. E. COCKBURN, Nov. 6, 1879.

*E. Clarke* (*Fulton* with him) for the defendant.—The 76th section of the 24 & 25 Vict. c. 76, enacts that: "Whosoever being a banker, merchant, broker, attorney, or agent, and being instructed either solely or jointly with any other person, with the property of any other person for safe custody shall, with intent to defraud, sell, &c., or in any manner convert or appropriate the same, or any part thereof, to or for his own use or benefit, &c., shall be guilty of a misdemeanour." That section is not applicable to this case, for the evidence does not show that the defendant was intrusted with property for safe custody. It rather shows that he was intrusted with it for investment.

HUDDLESTON, B.—By sect. 1 the term "property shall include every description of real and personal property, money debts, &c."

HAWKINS, J.—If you say the letters show that the defendant was intrusted with the money to invest on mortgage, then they amount to a direction in writing within sect. 75, and if they do not, then the money was intrusted to the defendant for safe custody within sect. 76, until Mrs. Mockett gave further instructions how it was to be dealt with.

*Clarke*.—The indictment charges the defendant with having committed the offence on the 6th day of April, 1872, and Mrs. Mockett's letter is on the 9th day of April. The defendant may have had sufficient money to satisfy the claim at that date.

HUDDLESTON, B.—Does it make any difference when he committed the offence? The only two questions that arise under sect. 76 are, was the defendant intrusted with the money as an

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attorney for safe custody, and did he convert it to his own use, and the jury have found both questions in the affirmative.

*Clarke.*—No doubt the jury must be taken to have found what they properly could find upon the facts to support the conviction, but the facts did not warrant the verdict. The facts were not sufficient according to *Reg. v. Tatlock* (2 Q. B. Div. 157 ; 13 Cox C. C. 378). In his judgment in that case, Cockburn, C. J. pointed out the kind of evidence necessary. He said : “ Assuming such a case to be within the statute, it would be a question for the jury whether the defendant at the time the money was received intended to embezzle it. Possibly proof that a party receiving money under such circumstances was, and knew himself to be, hopelessly insolvent, and being aware that his account at his bankers’ was heavily overdrawn, paid the money into the credit of his account, knowing that the effect of his so doing would be that it would be totally lost to the party entitled to it, might be sufficient evidence of an intention to convert the proceeds to his own use, although under other circumstances the payment of the money into his bankers might have been perfectly legitimate. But the only evidence of insolvency in the present case was that two months after the receipt of the money the defendant filed a petition for liquidation. At the time he received it he may have been solvent.”

*H. Ivory* for the prosecution.

COCKBURN, C. J.—That case was upon sect. 75. In the present the evidence was clear, for within a week or a fortnight of her letter Mrs. Mockett called on the defendant, when he told her two lies, that he had invested the money on mortgage, and that the deed was lying on the table, and she in her evidence said she did not look at it, as she had not got her spectacles with her. Within a week of receiving the money he begins to concoct the fraud to conceal the fact of his having appropriated it to his own use. There can be no question that the case is within sect. 76.

HUDDLESTON, B.—I might have had doubts as to whether there was a sufficient direction in writing within sect. 75, but I have none as to the case being within sect. 76.

LINDLEY, J.—The case is clearly within sect. 76.

MANISTY and HAWKINS, JJ. concurred.

*Conviction affirmed.*

## CROWN CASES RESERVED.

*Saturday, December 6, 1879.*

(Before COCKBURN, C.J., LUSH, J., HUDDLESTON, B., LINDLEY and HAWKINS, JJ.)

REG. v. ROBERT MARTIN. (a)

*Forgery—Drawing a cheque in a person's own name—No assets at the bank—False pretences.*

*In payment of goods the prisoner filled up a banker's cheque and gave to the seller. The prisoner's name was Robert Martin, but he signed the cheque in the name of William Martin. The seller took the cheque as that of the prisoner without noticing the alteration in the Christian name. Upon presentation at the bank, where the prisoner had no assets, the cheque was dishonoured on the ground that the signature was not that of any customer of the bank.*

*The prisoner having been convicted on an indictment for forgery, the Court quashed the conviction, as this was not a forgery, but a case of false pretences.*

CASE reserved for the opinion of this Court by Cockburn, C.J. The prisoner, Robert Martin, was tried before me at the late assizes held at Maidstone on an indictment which charged him in one count with having forged, in another with having uttered a forged order for the sum of 32*l.* with intent to defraud. The facts were as follows :

The prosecutor, George Lee, is a horse dealer at Ashford, in Kent. The prisoner Martin had been for many years collector of the tolls of the markets of Ashford and Maidstone, and was well known to the prosecutor. In the course of the present year the prisoner, having ceased to hold the above-mentioned office, left the neighbourhood, and went to reside in Southwark. On the 2nd day of September, being again at Ashford, for what purpose did not appear, he saw the prosecutor Lee in the street in a pony cart, and accosted him, inquiring if he (Lee) had a pony for sale, whereupon the prosecutor recommended him to buy the pony he was then driving. A deal ensued, the result of which was that the prosecutor agreed to sell, and the prisoner to buy, the pony and carriage for 32*l.*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



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The prisoner proposing to give his cheque for the amount, both parties went into an adjoining inn, in order that the cheque might be there drawn. The prisoner then produced a printed form of cheque of the bank of Messrs. Wigan and Co., bankers, of Maidstone, taken from a cheque book, of which he had become possessed as a former customer of the bank. This he filled up, in the presence of the prosecutor, with the name of the latter as payee, signed it in the name of William Martin, his name being Robert, and delivered it to the prosecutor, who put it in his pocket without further looking at it, or observing in what name it was signed, after which he proceeded to give possession of the pony and carriage to the prisoner. On the ensuing morning the prisoner drove the pony and carriage to town, and on the day after drove to Barnet Fair, where he sold both. On the cheque being presented at Messrs. Wigan's Bank payment was refused on the ground that the signature was not that of any customer of the bank.

The prisoner had been a customer of the bank, and had had an account there in his proper name of Robert Martin, but his account remaining overdrawn for some time after he had ceased to be the collector of the market tolls, and the bank insisting on the balance due to them being paid, the amount was accordingly paid on the 4th day of June, and the account was then closed. No money was afterwards paid in to prisoner's credit, nor was any cheque drawn by him. He asserted indeed in his defence on this charge that he had expected money to have been paid in to his account, but no evidence was adduced to show that there was any foundation for this statement. No name was mentioned of any person owing him money, or by whom he expected money to be paid into the bank on his account. He had ceased to all intents and purposes to be a customer of the bank, and must have been fully aware that a cheque drawn by him on the bank would certainly be dishonoured.

Under these circumstances there can be no doubt that the prisoner had been guilty of the offence of obtaining the prosecutor's goods by false pretences. But the indictment being for forgery of the cheque, and it appearing to me doubtful whether the charge of forgery could upon the facts proved be upheld, I reserved the case for the consideration of this Court.

In considering this question I have further to call attention to the following facts :

The prisoner in drawing this cheque and delivering it to the prosecutor did not do so in the name of or as representing any other person, real or fictitious. The cheque was drawn and uttered as his own, and it was so received by the prosecutor, to whom the prisoner was perfectly well known as an acquaintance of twenty years' standing, and by whom he was seen to sign it. The prisoner did not obtain credit with the prosecutor by substituting the Christian name of William for that of Robert. He would equally have got credit had he signed his proper name

of Robert. The credit was given to the prisoner himself, not to the name in which the cheque was signed. The cheque was taken as that of the individual person who had just been seen to sign it, not as the cheque of William Martin, as distinguished from Robert Martin, or of any other person than the prisoner. On the contrary, if the prosecutor, who knew the prisoner's name to be Robert, had observed that the signature was in the name of William, he would in all probability have suspected something wrong, and would have refused to take the cheque.

There was nothing whatever from which the motive of the prisoner in signing a wrong Christian name could be gathered. There happened, indeed, to be a William Martin, a customer of the bank; but this was unknown to the prisoner; besides which, as the prisoner was perfectly aware that his person and true name were well known to the prosecutor, it could not be supposed that he intended to pass himself off as, or the cheque as the cheque of, any William Martin other than himself. The only motive which has occurred to my mind as one which might have induced him to sign a false Christian name is that he may have thought that by so doing he might avoid being liable on the cheque when payment had been, as it was certain to be, refused. This, however, amounts to no more than conjecture. Be it as it may, and whatever may have been the motive, it occurred to me that, while there had been a fictitious signature to the cheque in question, so far as the Christian name was concerned, yet the signature having been affixed by the prisoner, and the cheque delivered by him as his own, though there had been a signature in a fictitious name, the name could not be said to be that of a fictitious person; and that, in this respect, the case did not fall within the principle of the cases in which it has been held that the use of the pretended name of a fictitious person amounts to forgery.

I have therefore sought the assistance of the Court as to whether, under the circumstances, the affixing a fictitious Christian name to this cheque by the prisoner amounts to forgery as charged in the indictment.

A. E. COCKBURN.

No counsel was instructed to argue.

COCKBURN, C.J.—The conviction must be quashed. This case is concluded by authority. In *Dunn's case* (1 Leech C. C. 57) the Judges agreed "that in all forgeries the instrument supposed to be forged must be a false instrument in itself, and that if a person give a note entirely as his own his subscribing it by a fictitious name will not make it a forgery, the credit there being given to himself without any regard to the name or without any relation to a third person." That exactly applies to this case.

LUSH, J.—I had the same question before me at the last Autumn Assizes, and I directed an indictment for false pretences to be preferred.

COCKBURN, C.J.—That ought to have been done in this case.

HUDDLESTON, B., LINDLEY and HAWKINS, JJ., concurred.

*Conviction quashed.*

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## CROWN CASES RESERVED.

*Saturday, November 22, 1879.*

(Before COCKBURN, C.J., HUDDLESTON, B., LINDLEY, MANISTY, and HAWKINS, JJ.)

REG. v. J. A. WILSON. (a)

*Bankruptcy Act, 1869—Infant—Quitting England with property divisible among creditors—Debtors Act, 1869.*

*An infant trader quitted England, and whilst abroad a petition was filed upon which he was adjudicated a bankrupt. He was arrested, brought to England, indicted and convicted under sect. 12 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), for having feloniously, within four months before the presentation of a bankruptcy petition against him, quitted England and taken with him 20*l.* and upwards, which ought by law to have been divided amongst his creditors, with intent to defraud.*

*Held, that the conviction could not be sustained, as the debts of the creditors who proved were void by the Infants Relief Act, 1874, none of them being for necessities.*

*Quære, whether sect. 12 applies when the person adjudged bankrupt has quitted England before the presentation of the petition.*

**C**ASE reserved for the opinion of this Court by the Recorder of Hull, Yorkshire.

1. The prisoner, John Anlay Wilson, was tried before me at the last quarter sessions at Hull, on an indictment under the 12th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), charging him with having feloniously, within four months before the presentation of a bankruptcy petition against him, quitted England, and taken with him his money to the amount of 20*l.* and upwards, which ought by law to have been divided amongst his creditors, with intent to defraud.

2. The prisoner traded in Hull as a Baltic merchant.

3. On the 19th day of October, 1878, he drew out of his banker's hands at Hull the sum of 128*l.* in cash, and on the 27th of the same month quitted England for Sydney, and arrived at the latter place on the 2nd day of February, 1879.

4. On the 30th day of November, 1878, within four months of the prisoner having quitted England as aforesaid, a petition in

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

bankruptcy was presented in the local Court of Bankruptcy at Hull against him, and he was on the same day adjudicated a bankrupt.

5. At the time the prisoner was so adjudicated a bankrupt he was on the high seas on his way to Sydney, sailing near the Equator.

6. On the 2nd day of December, 1878, an order to prosecute the prisoner was made by the said Court of Bankruptcy.

7. On the 3rd day of February, 1879, the prisoner was apprehended at Sydney and charged with this offence, and he then gave up to the officer apprehending him the sum of 96*l.* in gold and notes, and confessed to him that it was part of the money he had taken with him when he quitted England.

8. The debts proved against the estate were all trade debts, and contracted by the prisoner in his trade as a Baltic merchant. No debts for necessaries were proved against the estate, nor was it shown that any debts for necessaries existed.

9. The file of the proceedings in the said Bankruptcy Court was put in evidence, and amongst them was the order of adjudication of the prisoner to be a bankrupt, dated the 30th day of November, 1878.

10. No copy of the *London Gazette* containing the order of the local Court of Bankruptcy adjudging the prisoner to be a bankrupt was produced in evidence before me, or filed amongst the proceedings in the said Bankruptcy Court, but only a single sheet purporting to be a sheet of the *London Gazette*, and that single sheet contained the order adjudging the prisoner to be a bankrupt.

11. On the prisoner's part it was proved before me that the prisoner was born on the 13th day of March, 1859. He was consequently a minor at the time of the aforesaid adjudication of bankruptcy, and at the time when he contracted the aforesaid debts which had been proved against his estate; and it was contended on his behalf that by reason of his infancy the said proceedings in bankruptcy were void, that he had not and could not have any creditors within the meaning of the 12th section of the Debtors Act, 1869, amongst whom the property which he took away with him ought by law to be or to have been divided, inasmuch as since the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), contracts by infants, except for necessaries, are void, and that the prisoner was never liable at law or in equity for the said debts contracted during his infancy, and could not have creditors in respect of them.

12. It was also contended on the prisoner's behalf that there was no conclusive proof of the order of adjudication of bankruptcy, inasmuch as no copy of the *London Gazette* containing the order was filed in the proceedings in bankruptcy or produced in evidence at the trial.

13. I determined to submit these points to the consideration of the Court for Crown Cases Reserved, in the event of the prisoner

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being convicted, and I left the case to the jury upon the other proved facts, telling them that they should, if those facts were made out to their satisfaction, find him guilty, unless they were satisfied that the prisoner had no intent to defraud when he quitted England, taking with him his property as he did, and they found him guilty and recommended him to mercy.

14. The prisoner had been in custody from the time of his apprehension in Sydney.

I respited sentence, and let him out on his own recognisance in 100*l.* to appear at the next sessions or when called upon, and reserved this case for the consideration of this Court.

I now respectfully ask for the opinion of this Court whether, under the circumstances stated, the prisoner's conviction ought to be affirmed or quashed.

W. C. BEASLEY,  
Recorder of Hull.

Nov. 7th, 1879.

*Cyril Dodd* for the prisoner.—The conviction cannot be sustained. The indictment was framed under the 12th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), which enacts that if any person who is adjudged a bankrupt, or has his affairs liquidated by arrangement, after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with him, or attempts, or makes preparation for quitting England and taking with him any part of his property to the amount of 20*l.* or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury shall be satisfied that he had no intent to defraud) be guilty of felony punishable with imprisonment for a term not exceeding two years with or without hard labour. This section does not apply, the prisoner having quitted England before the adjudication in bankruptcy. [COCKBURN, C.J.—I suppose your contention is that the adjudication, though final for proceedings in bankruptcy, is not so as regards criminal proceedings against the bankrupt.] Yes. Secondly, the prisoner being a minor when these debts were contracted, they were void by the Infants Relief Act, 1874 (37 & 38 Vict. c. 62, s. 1), which enacts that all contracts whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants shall be absolutely void.

*Gorst*, Q.C., for the prosecution, contended that the 12th section of the 32 & 33 Vict. c. 62, did apply, although the bankrupt was abroad at the time of the adjudication, he having gone abroad within four months before the presentation of the petition in bankruptcy; and that this appeared to be the proper construction from a comparison of that section with the previous section 11. As to the second point, he admitted that as by the operation of

the Infants Relief Act, 1874 (a) the prisoner had no legal creditors, the adjudication in bankruptcy could not be sustained, and the conviction must therefore be quashed.

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The COURT gave no decision upon the first point, and said that they were all agreed that the prisoner could not be convicted under sect. 12 because he was a minor when the debts were contracted.

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*Conviction quashed.*

## SUFFOLK ASSIZES.

*Friday, February 13, 1880.*

(Before BRAMWELL, L.J.)

REG. v ORMAN AND BARBER.

*Conspiracy—Purchase of goods without intention of paying for them—Agreement to do an act not in itself criminal—Conspiracy to do an “unlawful” act.*

*A. obtained goods on credit at B.’s suggestion, in order that A. might sell them to B. below their value, B. aiding A. as a referee, and giving him a character. The evidence was such that B. must have known that A. was getting the goods without any intention of paying for them.*

*Held, that B. was guilty of conspiring with A. to defraud.*

MARIA ORMAN and Maria Barber, her mother, were indicted for that they did, together with one Edwin Thos. Groom, conspire together by divers false pretences and indirect means, and by fraudulent and artful devices, to obtain jewellery, clothes, and other goods from divers tradesmen carrying on business in the borough of Ipswich. (There were twelve counts in the indictment, each naming a different tradesman from whom goods had been obtained.)

*Poyser* for the prosecution.

*Blofeld* and *Frere* for Orman.

*Reeve* and *Frere* for Barber.

*Poyser.*—The acts complained of would not amount to a crime in an individual, but an indictment would lie for conspiracy when they were the result of an agreement between two or more

(a) By the Infants Relief Act, 1874, s. 1 (37 & 38 Vict. c. 62): “All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void: Provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.”



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persons. The evidence would show that Groom obtained goods from the tradesmen with no intention to pay for them. The defendants were aware of this and were parties to his doing so. They arranged with him before he purchased, and suggested what articles he should get. This was an agreement to cheat. It was "a defrauding or endeavouring to defraud another of his known right by means of some artful device, contrary to the plain rules of common honesty," which was the definition of cheating in Hawkins' Pleas of the Crown. Cheating had ceased to be a crime in itself, but a combination to cheat is still indictable. "There can be no doubt that all conspiracies whatsoever wrongfully to prejudice a third person are highly criminal at common law:" (1 Hawkins' Pleas of the Crown, cap. 72, s. 2). The act need not be criminal in itself, for the conspiracy was the gist of the offence. This was so held in the case of a knock-out at an auction (*Levi v. Levi*, 6 C. & P. 239), and in the case of a mock auction (*Reg. v. Lewis*, 11 Cox C. C. 404). An agreement to misrepresent the solvency of a bank has been held to be criminal (*Reg. v. Brown and others*, 7 Cox C. C. 442; 1 F. & F. 213); and in one of the latest cases (*Reg. v. Warburton*, L. Rep. 1 C. C. 274; 11 Cox C. C. 584; 40 L. J. 22, M. C.), where one of two partners was charged with conspiring with a third person to defraud the other partner, Cockburn, C.J. says: "It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i.e., amount to a civil wrong." [BRAMWELL, L.J.—There is also the Tailors' case, which referred to "picketing," which might be cited: *Reg. v. Druitt*, 10 Cox C. C. 592; 16 L. T. Rep. N. S. 855.]

The facts of the case were then dealt with at length, and evidence was called for the prosecution.

Edwin Thomas Groom, in answer to questions, stated that he had known the prisoners sixteen years, and had first met them at another public house in Ipswich, where he used to send beef, bacon, and grocery. They afterwards, he said, went to the Cardinal's Hat, which was kept by the older prisoner, the other, her daughter, living there. He used to live there from morning to night, and used to order goods, which, at Barber's suggestion, were on printed forms, they suggesting the articles to be ordered, and he then sent for them by his little boy to their house. Shown the order for the rings, he said it was written at the suggestion of the prisoners. First he got a pair of gold earrings, valued at 1l., one of which he sold to Barber, and the other to Orman. Then he got from the same jeweller, at their suggestion, a gold necklet, with locket attached. His little boy brought it back, the price being 2l. 15s., for which he said the prisoners would only give 15s., and recommended him to take it to some one else.

Then he got a tea service by a similar order, written in the presence of the prisoners, and, at the suggestion of Orman, a gold and white service, price 1*l.*, which Orman, he said, had for 6*s.* 6*d.*; and another order was for fifteen yards of alpaca, &c., the price of which was 1*l.* 12*s.* 7*d.* Similar orders were sent for "a large printed Bible and Church Service," price 24*s.* The elder prisoner observed that she had now almost everything she wanted except a Bible in large print, as she was getting into years. The order was particularly for a large printed Bible and a Church Service to correspond. The prisoners, the witness said, always saw the bills of the articles sent, and the orders were mostly written in their presence. The prisoner Barber gave him only 8*s.* for the Bible and Church Service, the price of which was 24*s.* Then he wrote, at her desire, to another book-seller for another Bible and Church Service—10*s.*—for which she gave him 3*s.* 6*d.* Then, in the same way, he got a revolver, giving Mrs. Orman as a reference, and she, in the presence of the witness, gave him a good character for solvency to the tradesmen, who thereupon sent the revolver and cartridges, price 1*l.* 13*s.* 9*d.*, for which the prisoner gave him 14*s.* The revolver was for a son, she said, of hers in Zululand. And so in other similar cases. The orders were written on printed forms, headed "Frederick E. Groom, Plumber, &c., 56, Station-street, Ipswich—To (blank for the names of the tradesmen)." Then the order would be written, "Please let my little boy have a lady's gold chain at a moderate price, &c." The price was always to be paid at once in cash, but none of the goods were ever paid for.

Pallant, a police constable, stated that when he went to the Cardinal's Hat to make inquiries for goods obtained by Groom, defendants said they had had no goods at all of Groom, and that he was a "scamp." Then being asked as to the tea service, the prisoner Orman admitted it. Then being asked as to the revolver, she said it was bought for a son of hers at the Cape; and so as to some clothes. Then as to the Bible and Church Service, Barber said that she had not had them, but Orman said, "Yes, mother, you had the Bible and Church Service." Then as to some other clothing, she admitted it; and being asked as to jewellery, they both denied having any. The policeman told them to take care what they said, or he should bring a very near relation to prove that they had had some, and on that Orman admitted giving Groom 5*s.* for a pair of earrings. He went again and asked for the goods they had of Groom, and Orman said, "You shall not have them, for I bought and paid for them, and I saw the bills, didn't I, mother?" to which Barber replied, "Yes." They were then taken into custody, and at their house the china tea service and some clothing, and the Church Service and Bible were taken.

Other evidence having been called at the suggestion of the learned Judge, the case against Barber was withdrawn.

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defraud.*

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*Frere* then addressed the jury on behalf of Orman, relying on the absence of any evidence of concurrence in any preconceived scheme to cheat the tradesmen. He suggested that the prisoner, his client, might very likely have been imposed upon by some specious story told by Groom; and as to the evidence given by the police, the answers she gave may have been prompted by alarm and apprehension, as they then could see that Groom was charged or suspected. He dwelt also upon the fact that Groom's evidence was wholly uncorroborated.

BRAMWELL, L.J., in summing up to the jury, said.—As far as my experience goes this case is a novelty. Groom has not stolen the goods; if he had, possibly the prisoner might have been indicted for receiving them knowing them to be stolen. So the prisoner is indicted for conspiring with Groom that he should get the goods without paying for them. That is, I believe, a novelty, and requires careful attention; and the question I shall leave to you, and which I have reduced into writing, is this: Did she and Groom agree that he should purchase and that she should aid him in purchasing goods on credit, and apparently as an ordinary purchaser, to resell to her? The evidence of Groom, of course, is not reliable unless corroborated, and if there had only been one or two cases it might not have been a reliable case, but here there are a great many cases. There could not be any doubt that these goods were got fraudulently, and that the defendant had many of them. It is difficult to suppose that she could have thought that Groom's dealings were honest. And the little boy corroborated Groom's evidence, and so does Groom's wife; and though she says her husband is not to be believed on his oath, there is no reason to say so of her evidence, which is confirmatory of the case for the prosecution, as is that of the police. It is manifest that Groom was getting these goods without paying for them, and as though they were for himself, when, in fact, he meant to resell them to raise money, and that is fraudulent. Clearly, then, she knew he was getting the goods dishonestly and fraudulently. Did she aid him in getting them? She was his referee and gave him a character, she told falsehoods to the police about the matter; though, on the other hand, the goods were not destroyed; but she did not know she was within the reach of the law, nor was she, as she was guilty of a conspiracy to obtain these goods on credit, with a view to immediate resale to raise money. And the question is whether you are satisfied that she was so guilty. I repeat that the charge is a novelty—that is not in principle, but in its particular character; a charge of conspiring to obtain goods by means not *per se* criminal as false pretences would be, and therefore, it should be carefully considered.

The jury found the prisoner guilty.

*Welford* asked that the point might be reserved.

The following morning

BRAMWELL, L.J., who had taken time to consider and consult

with Mr. Justice Denman, as to whether he should reserve the question of law, now announced his opinion to be that he ought not to reserve the question. If, he said, the prisoner had only received the goods obtained by Groom, he should not have thought there was evidence of a criminal conspiracy between them; or if there had only been an isolated case, and she had given him an untrue character, he should have doubted whether the jury ought to have found her guilty of a fraudulent and dishonest conspiracy. But here was a man who was getting goods on credit without the means, or hope, or intention of paying for them—getting them in the way in which people ordinarily bought goods. It was necessary for him to have a character, and it was given to him by the prisoner—a character which must have been false to her knowledge. He assumed these facts, because it was to be presumed that the jury had found them; and why was not that evidence of criminal conspiracy? So the case presented itself to his mind; but he was willing to hear any arguments the prisoner's counsel could address to him to raise any doubt in his mind upon it.

*Blofeld*, on behalf of the prisoner, urged that there was no unlawful—that is, criminal—act on the part of the prisoner, for, as to the false character, it merely came to this: that she said he was “good for the price of the revolver”—i.e., 29s.; and so he might have been for anything she knew.

BRAMWELL, L.J. said the effect of her statement was that he might safely be trusted; and she knew he was not such a man as might be safely trusted to pay. Did any one suppose that if the tradesman had known of him what she knew, he would have trusted him.

*Blofeld* urged that this was a new case and was stretching the law of conspiracy, and he urged that obtaining goods on credit without the present means of paying for them was not unlawful, and so the combination to do that was not unlawful.

BRAMWELL, L.J.—The getting goods on credit without meaning to pay for them may not be unlawful in the sense of being criminal or punishable; but it is not lawful, and it is fraudulent at common law; and, at all events for several to combine together to enable a person to get goods by means of a false character, knowing that he did not intend ever to pay for them, is surely criminal. A contract by the prisoner to give the man a character in such circumstances for that object would not be enforceable, being in that sense unlawful (which the prisoner's counsel admitted). On the whole, therefore, after much consideration, and conferring more than once with Mr. Justice Denman, who entertained no doubt on the question, he had come to the conclusion that he ought not to reserve the point; and, whether he did so or not, he should certainly sentence the prisoner, as he now did, to six months' imprisonment, with hard labour.

Solicitor for prosecution, *F. B. Jennings*, Ipswich.

Solicitor for the defence, *J. Mills*, Ipswich.

## Ireland.

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### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

November 25, 1879.

(Before MAY, C.J., and FITZGERALD, J.)

THE QUEEN (AT THE PROSECUTION OF VAL, MADDEN AND OTHERS)  
v. THE JUSTICES OF THE COUNTY OF GALWAY. (a)

*Malicious injury to property—Value under 5l.—Summary jurisdiction of magistrates—Objection not raised in court below—24 & 25 Vict. c. 97.*

*Where certain persons were summoned at petty sessions for maliciously injuring a dwelling house, and the magistrates deeming the injury trifling proceeded to deal with the case in a summary manner, although no regular complainant appeared on the summons, and it was not proved that the injury was less than 5l., that being the extreme amount of injury with which the magistrates had power to deal in a summary manner, it was*

*Held that, the defendants not having raised the objection to the magistrates' want of jurisdiction in the Court below, the conviction was good, and should not be reversed.*

**M**OTION to make absolute a conditional order for a *certiorari*. The facts, as appeared from the affidavits were, as follows: The house of the Rev. R. Ryder was attacked on the night of the 30th of June by a crowd of persons who, after endeavouring to obtain admittance, broke some of the panes of glass in the house and then retired. Mr. Ryder's maid servant gave information to the police, and the defendants were arrested about ten o'clock the same evening by the constabulary, without any warrant previously issued for their arrest. They were kept in custody the whole of that night, and next morning were brought before the magistrates at petty sessions, but no summons was issued against them. The

(a) Reported by OEOIL R. ROCHE, Esq., Barrister-at-Law

charge was taken down in the petty sessions book by the clerk from the statement of the sub-inspector of constabulary. It was alleged that the magistrates ordered the clerk of petty sessions to make a charge against all the defendants upon the order book, but this was contradicted in the magistrates' affidavit. It was entered as *The Queen at the Prosecution of the Royal Irish Constabulary v. Val, Madden, and others*, and the complaint was "for that the defendants and each of them were of a party who, on the 30th day of June, 1879, at Derrygimla, in the said county, did unlawfully and maliciously break some glass in the dwelling-house of the Rev. Roderick Ryder, clerk."

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The magistrates, on hearing the case, fined one of the defendants 10s. 6d. and 6d. costs, and sentenced the others to fourteen days' imprisonment with hard labour. The defendants' solicitor did not raise any question as to the case not falling within the summary jurisdiction of the magistrates, nor did he object to the want of a summons, or that the Rev. Mr. Ryder was not the complainant.

The affidavits stated that the glass broken was only worth a few shillings. The defendants' solicitor asked that the sentence might be increased to imprisonment for one month and a day to enable them to appeal, but this the magistrates refused.

A conditional order for a *certiorari* to quash the convictions having been obtained on behalf of the prisoners,

*F. Nolan*, for the prisoners, moved to make the order absolute. The Act which deals with cases of malicious injuries is the 24 & 25 Vict. c. 97. In some cases the magistrates have summary jurisdiction with respect to proceedings under that statute, but not in the majority. Sect. 52 gives the magistrate summary jurisdiction for injury to property not provided for by other sections. Sect. 51 provides for injury where the property is over 5l. in value. Under that section the magistrates have no summary jurisdiction. Here the charge is not for injury to property under the value of 5l., and therefore the conviction is bad: (*Charter v. Græme*, 13 Q. B. 216.) The defect in the charge to show that the offence was within the summary jurisdiction cannot be remedied by evidence that the value of the property was in fact under 5l.: (Paley on Convictions, 237; *R. v. Wheatman*, per Mansfield, C.J., Doug. 346.) Further, this conviction is bad, because there is no prosecutor. There is no corporate body known as the Royal Irish Constabulary. In the absence of a prosecutor it is impossible that the preliminaries required for an appeal could be complied with: (14 & 15 Vict. c. 93, s. 24.) The penalty is intended to compensate prosecutor. Where a statute gives the penalty to prosecutor the proceedings must be on behalf of the owner: (Paley, 221-224.) It is said that the above matters were not raised below; but this is a question of jurisdiction, and in no case, especially with respect to criminal matters, can consent give jurisdiction. The issue of a *certiorari* where a person is aggrieved is not in the discretion of the



THE QUEEN, Court. It issues *ex debito justitiæ* : (*Reg. v. Justices of Surrey*,  
&c. 5 Q. B. 466.)

v.  
THE JUSTICES OF GALWAY. The *Solicitor-General* and *Naish* showed cause on behalf of the  
magistrates. They cited and referred to *Turner v. Postmaster-General* (5 B. & S. 756), *Reg. v. Long* (1 M. & R. 139), *Re Lord Listowel's Fishery* (1 R. 9 C. L. 46).  
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MAY, C.J.—The question in this case is whether a *certiorari* directed to the justices of the county of Galway should issue in order that the conviction should be brought into court to be quashed. It appeared from the evidence in the case that late on the evening in question some persons came to the door of the Rev. Mr. Ryder and violently demanded admission, which was not obtained. The party returned to the house in increased numbers and broke three panes of glass; the delinquents then ran away. Mr. Ryder's maid servant went for the police, and they arrested these persons charged with the offence. It being late at night the prisoners were lodged in the police barrack, and next day they were brought before the magistrates. The justices inquired as to the nature of the charge against the defendants. On the dictation of the constable in whose custody the defendants were, the clerk of petty sessions entered a charge in writing, to the effect that the defendants had been part of a party which had maliciously injured these premises, but in filling up the petty sessions book under the column of complaint the entry was "The Queen at the Prosecution of the Royal Irish Constabulary." It is evident that the case was intended to come before the magistrates not under their summary jurisdiction, but with a view to take informations and send the case for trial. But the magistrates, taking apparently a humane view of the case, and thinking it would be more for the advantage of the accused that the case should be disposed of in a summary manner, heard the evidence adduced by the constable, the solicitor for the defendants adducing counter-evidence. The result was that the magistrates, dealing with the case under their summary jurisdiction, sentenced three of the accused to imprisonment for fourteen days, while another, who was only twelve years of age, was fined ten shillings. These persons now come to this court to quash the proceedings. It was first objected that the arrest was illegal. It is apparent that the arrest was made a little hastily by the constable, who may have thought it was a case of felonious destruction of buildings, or that it came within sect. 61, which enables constables to arrest persons found committing malicious injury. But whether the arrest was proper or improper, these persons were before the magistrates, the charge was made in writing and read over in their presence, and no complaint was made of an illegal arrest; the magistrates therefore were clearly warranted in hearing the case. The second objection is that there was no complainant. This objection rests upon 24 & 25

Vict. c. 97, and the Petty Sessions Act. It is said that no proper complainant appears on the conviction, but it is to be observed that, although the above-mentioned entry was made in the magistrates' book, yet in point of fact there was a complainant, namely, the constable who entered the complaint and read it out before the accused, and it is manifest that it would be still competent to correct this mistake in any conviction regularly drawn up. The important feature in the case is that the solicitor for the defendants acquiesced in the magistrates entertaining the case under their summary jurisdiction, and did not then make any one of the objections now insisted on. So far was he from objecting that he requested the justices, in further exercise of their summary jurisdiction, to increase the term of imprisonment in order to enable the defendants to appeal upon the merits. It is to be further observed that sect. 69 of this Act of 24 & 25 Vict. c. 97 takes away the right of *certiorari*. Now, if the magistrates had dealt with the case, being wholly without jurisdiction to adjudicate upon it, the writ might issue notwithstanding this section. But it seems to me they had abundant jurisdiction. The defendants were present, the charge was read over in their presence, and the offence was one capable of being dealt with in a summary way. Further, the accused, instead of objecting, voluntarily assented to and acquiesced in the proceedings. Under such circumstances, I think the court, exercising a sound judicial discretion, ought to refuse the issue of the writ.

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FITZGERALD, J.—I concur in the judgment of the Lord Chief Justice, being of opinion that the course pursued by the defendants at the trial before the justices at petty sessions was such as to preclude them from raising on a *certiorari* motion the several or any of the objections which are now urged. In the exercise of our judicial discretion we must always be much influenced by the course of conduct pursued in the court below, and rarely give effect to objections not made to the primary court, and more especially when the objections, if made, were capable of being then remedied. I have looked into the affidavit of the defendants' solicitor, and he complains of the arrest. I need hardly say that cannot come before us now. It may be that the police officer acted illegally, but with that we have at present nothing to do. As to the next objection, that there was no summons, there is no doubt that the proper and regular course would have been to proceed by summons; the case should have been adjourned and a summons issued. But that objection was not raised in the primary court, nor any adjournment sought for. The only other objection is that one of the magistrates ordered the complaint to be entered. That is, however, completely answered by the affidavit of the magistrate. The defendants complain that there was no evidence. We are of opinion that there was evidence quite proper to be considered, and sufficient to warrant a conviction. As to the objection that the constabulary should not have been made parties to the case, but that Mr. Ryder, the

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party injured, should have been prosecutor, no such objection was raised in the court below, and had it been raised it could have been obviated, for Mr. Ryder was standing by, and was one of the principal witnesses, and his name could have been substituted if the objection had been raised. On the whole of the case, we think that although there might have been some force in the objections if they had been raised below, the defendants are not now entitled to raise them here, nor would they justify us in the exercise of our discretion in issuing a *certiorari*.

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## KENT WINTER ASSIZE.

MAIDSTONE CROWN COURT.

Thursday, January 15, 1880.

(Before DENMAN, J.)

REG. v. CRAMP. (a)

*On an indictment under 24 & 25 Vict. c. 100, s. 58, for causing to be administered to a woman "a noxious thing," described in one count as an excessive dose of oil of juniper, which was the drug administered (first in a small and then in a large quantity) with intent to cause miscarriage—it not having per se any direct tendency to produce miscarriage, but even in a small quantity producing vomiting, and so having an indirect tendency if taken in excess, to cause miscarriage by reason of violent vomiting or purging :*

*Held, that if there was an administration of such an excessive dose caused by the prisoner with the intent alleged, it would be a "noxious thing" within the Act; and, semble, that as the statute does not require that the drug should have any tendency to produce miscarriage, it is enough if it is "noxious," and is given with the intent charged, if it is in itself hurtful. There being no other evidence but the woman's that the prisoner incited her to take the excessive doses except that her father accused him of giving his daughter such things "to produce abortion," and that he did not deny it.*

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

*Held, that this was some corroborative evidence, even assuming the woman to be in the position of an accomplice requiring corroboration.*

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**T**HE prisoner was indicted under 24 & 25 Vict. c. 100, s. 58, for feloniously causing one Ellen Verrall, to take certain noxious things with intent to procure her miscarriage, at Tonbridge, on the 23rd day of June, 1879. The first count charged that he feloniously caused her to take an excessive quantity of oil of juniper with that intent, the same being a noxious thing within the statute. A second count charged that he feloniously caused her to take an excessive quantity of Epsom salts, with the same intent. A third count charged that he caused her to take a noxious thing unknown, &c.

*Administering  
a noxious thing.*

*A. B. Kelly, and Lewis Coward, for the prosecutor.*

*D. Kingsford, and Gill, for the prisoner.*

The prisoner had become intimate with the young woman, and, as she said, intercourse had taken place on one occasion early in June. About three weeks afterwards she told him she saw that she was not unwell (*i.e.*, not menstruating) as usual, which it was suggested was a mode of intimating that she suspected she was likely to be with child. He suggested some gin and water, and as that had no effect took her to a chemist, from whom he obtained a half ounce bottle of oil of juniper, of which he gave her a few drops on a lump of sugar, giving her the bottle, first destroying the label, and telling her to take the rest, as she said, half the bottle at a time. Having taken it she was sick, but it had no other effect, and on her telling him so, he first got the bottle and threw it away, and then took her, she said, to another chemist, and got her another ounce bottle of oil of juniper, removing the label, then giving her the bottle and telling her (as she said) to take it, half a bottle at a time. She, however, only took a small portion of it, and, finding that it only made her sick, she took no more, and the bottle was produced in court about three-quarters full. He then, she said, gave her two ounces of Epsom salts, telling her to take them which she did, and afterwards some pills, produced, and admitted to be innoxious, and intended to promote menstruation. Two months later, she, then being clearly pregnant, told her father, and gave him the bottle and the box of pills, and he had an interview with the prisoner, and pressed him to marry her, and on his hesitating, said to him, "I have here those things which you gave my daughter to produce abortion," which the prisoner, he said, did not deny.

It was proved that the contents of the bottle were essential oil of juniper, and that the half-ounce bottle would contain about 500 drops, so that half the bottle would be at least 240 drops. It was proved by the medical witnesses for the prosecution that if given medicinally as a diuretic from five to ten drops would be an adequate dose, and that any such quantities as 240 drops, or

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even half that quantity, would act as a powerful irritant and operate as a cathartic and emetic, producing violent purging or vomiting, or both, which, from its action on the general system, would, in a case of pregnancy, tend to promote miscarriage. And so as to a dose of two ounces of Epsom salts said to have been given, it would, though it might produce no other ill effects, yet it was stated that miscarriage so produced must more or less be injurious to the woman.

At the close of the case for the prosecution it was submitted on the part of the prisoner that the evidence of the young woman, assuming it to be true, showed that she was an accomplice, and that her evidence therefore required corroboration, and a ruling of Thesiger, L.J., at the Summer Assizes, 1878, was cited to that effect. It was submitted also that as it did not appear that either of the substances mentioned was actually directly calculated (like savin and some other substances) to produce miscarriage, and they would be injurious only in excess, and by effects tending only indirectly to that result, the case for the prosecution rested entirely on the suggestion that the prisoner had caused the woman to take the excessive quantity, (a) of which it was argued there was no evidence whatever but her own statement, and therefore it was submitted that there was no case to go to the jury, and that the case for the prosecution failed.

*Kelly*, for the prosecution, submitted that the evidence of the girl's father afforded ample corroboration, as he stated that he had accused the prisoner of giving his daughter things "to produce abortion," and he had not denied it.

DENMAN, J., however, without calling upon the counsel for the prosecution to argue the question, said that he could not stop the case. Whether, he said, the girl was an accomplice or not depended on whether the prisoner had the intent alleged, and whether she was privy to it, and so the question could hardly be determined by him then without entering into the very question on which the jury would have to give their decision whether the person had that intent, and on which he did not now desire to give any opinion. Assuming, however, that the woman was an accomplice and required corroboration, he was not prepared to say that there was no corroboration, and his impression was that it was a case which ought to go to the jury.

The case for the defence was that the oil of juniper was given by the prisoner only to promote menstruation, and that it was often taken by people in the country with that object; that he had not suggested the excessive dose, and that it was a mistake of the girl to think so; that even an excessive dose would have no direct tendency to promote miscarriage, but only at the

(a) This, it is conceived, was a fallacy, as the statute does not require that the thing given shall tend to promote miscarriage, but only that it shall be "noxious," and be given with that object. And it was proved that even the smaller quantity of oil of juniper caused vomiting, which when not excited medicinally must surely be injurious.



worst some indirect effect by reason of vomiting or purging, but that in an early stage of pregnancy these operations would have no such effect, and that though 240 drops might be an excessive quantity at a time, doses of sixty or 120 drops might be and had been taken without any seriously ill effect, and even repeated. And so as to the Epsom salts, it was said it would only in excess cause a vomiting. But even the medical witnesses for the defence admitted that 240 drops would be an excessive dose of oil of juniper, and two ounces an excessive dose of Epsom salts, and that neither of them were things fit to be given in such doses to a pregnant woman, and might and probably would lead to great irritation, vomiting, &c., which would be in some degree injurious, and that so in that way they would be noxious; and the principal medical witness for the prosecution, being recalled, stated that the purging or vomiting so caused would cause a straining likely to be injurious to a pregnant woman and tending to produce miscarriage. It was not denied that, assuming a woman to be pregnant, giving her things of a stimulating character, such as are used to promote menstruation, would be injurious. Upon this evidence,

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DENMAN, J., left the case to the jury. There are, he said, three questions for you to consider. First, whether the prisoner caused these things to be administered and taken by the woman. Secondly, whether they were, in the quantities in which he caused them to be taken, "noxious" things. Thirdly, whether he caused them to be administered with the intent alleged, *i.e.*, to produce miscarriage. If he caused her to take such an excessive quantity of these things as would produce the effects described, they would in such quantities be "noxious things" within the meaning of the statute. The prisoner could hardly have failed to understand that the girl was apprehensive of pregnancy, and if in this state, things given to promote menstruation would, it is admitted, be injurious; and this is material to consider with reference to the intent. With reference to the evidence, however, it is alleged that the woman was an accomplice, and that her evidence requires corroboration. But she would not be an accomplice unless he had the intent alleged, and she was privy to it. No doubt, if she were an accomplice the evidence of an accomplice requires corroboration, and on a material point. And it is said here that the point of evidence on which everything turns is, that the prisoner intended and suggested that these things should be taken in excessive quantities, and that of this there is no evidence but the woman's, and that of that there was no corroboration. But is that so? Taking the evidence altogether, does it or does it not afford corroboration of her evidence, on that part of the case as well as on the rest? The part of the evidence on which the counsel for the prosecution rely for that purpose is the evidence of the father, who states that he accused the prisoner of giving his daughter things to produce abortion, and that he did not deny it. I cannot say that this is



not evidence in corroboration, especially coupled with the other evidence, as the evidence of the chemists called to show that he went to one chemist after another and got this oil of juniper in two bottles about the same time, I cannot say that there is not corroborative evidence.

*Verdict guilty. Sentence fifteen months imprisonment.*

*NOTE*—The learned judge refused to reserve the question whether there was sufficient corroborative proof, not deeming that a question of law fit to be reserved; but he reserved the point whether oil of juniper was, as administered, a "noxious thing" within the Act, and on argument it was held that it was (see report *Reg. v. Cramp*, post, p. 401) as, in the quantity administered, it had an indirect tendency to cause miscarriage, and that anything which in the quantity administered might have such effect would be a noxious thing within the Act. But that point hardly arose, for it appeared that even the smaller quantity first given caused vomiting, and anything which causes vomiting (not being given as a medicine with that object) is hurtful and noxious; and the statute does not require that the thing should tend to produce miscarriage, but only that it should be noxious, and be administered with that intent. The case was fought at the trial, however, on the false issue that the drug must be such as, either in its nature or quantity, tends to produce miscarriage, and hence the point reserved was whether anything which in the quantity given tends to produce miscarriage is a "noxious thing" though not in itself noxious. But a thing which in any quantity causes vomiting, when it is not desirable to cause it, may surely be deemed noxious; and, if so, then the point reserved perhaps hardly arose.

## WARWICK ASSIZES.

*Tuesday, February 17, 1880.*

(Before COCKBURN, L.C.J.)

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The prisoners pleaded not guilty.

*Ewins Bennett* appeared for the prosecution.

*Daly* for the prisoner Brannon.

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Before the prisoners were given in charge,

*Bittleston* called attention to the form of the indictment. The joinder of these two charges relating to very different degrees of offence, and requiring perfectly different evidence to support each of them, was embarrassing. There was no statutory provision authorising the joinder of these two counts, and no precedent for such a form of indictment could be found in the books. He submitted that the prosecution must elect upon which count they would proceed.

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*Verdict guilty. Sentence fifteen months imprisonment.*

NOTE.—The learned judge refused to reserve the question whether there was sufficient corroborative proof, not deeming that a question of law fit to be reserved; but he reserved the point whether oil of juniper was, as administered, a “noxious thing” within the Act, and on argument it was held that it was (see report *Reg. v. Cramp*, post, p. 401) as, in the quantity administered, it had an indirect tendency to cause miscarriage, and that anything which in the quantity administered might have such effect would be a noxious thing within the Act. But that point hardly arose, for it appeared that even the smaller quantity first given caused vomiting, and anything which causes vomiting (not being given as a medicine with that object) is hurtful and noxious; and the statute does not require that the thing should tend to produce miscarriage, but only that it should be noxious, and be administered with that intent. The case was fought at the trial, however, on the false issue that the drug must be such as, either in its nature or quantity, tends to produce miscarriage, and hence the point reserved was whether anything which in the quantity given tends to produce miscarriage is a “noxious thing” though not in itself noxious. But a thing which in any quantity causes vomiting, when it is not desirable to cause it, may surely be deemed noxious; and, if so, then the point reserved perhaps hardly arose.

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Brannon was ultimately convicted, and sentenced to fifteen years penal servitude.

## COURT FOR CROWN CASES RESERVED.

*Saturday, Feb. 28, 1880.*

(Before Lord COLERIDGE, C.J., DENMAN, J., POLLOCK, B.,  
FIELD and FITZJAMES STEPHEN, JJ.)

REG. v. FLATMAN. (a)

*Larceny by adulterer.*

*The prisoner, who was previously on familiar terms with prosecutor's wife, hired a cart, and told the owner to send it to the prosecutor's house to convey furniture for the woman whom he would find there to another address which he gave to the carter, and where the wife had previously engaged rooms without her husband's knowledge. The cart was sent as directed, and furniture loaded, the wife being present, and the husband absent, and the prisoner not being at the loading. The wife accompanied the cart to the lodgings. The prisoner did not appear at the lodgings until the next night, which he passed with her there, and then lived there in adultery with the wife for some days afterwards, using the furniture.*

*The jury having convicted the prisoner of stealing the furniture, this court affirmed the conviction.*

CASE reserved for the opinion of the Court by the Recorder of Liverpool.

The prisoner was convicted before me at the Liverpool Borough Sessions, held on the 16th day of December 1879, of stealing a quantity of furniture, the property of Henry Goucher.

The prisoner was a soldier, on special duty, and living in private lodgings.

The prosecutor, Henry Goucher, was a Liverpool policeman, who lived with his wife in a house in the same street in Liverpool in which the lodgings of the prisoner were situated, and within a hundred yards of such lodgings.

The prosecutor had upon two occasions shortly before the alleged stealing observed his wife in the street very near his house

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

in conversation with the prisoner. He had remonstrated with her on both occasions, but did not remonstrate with or speak to prisoner.

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On the evening before the alleged stealing, being the second of those occasions, the prosecutor from his house window observed his wife in the street with the prisoner. This led to a violent altercation between the prosecutor and his wife.

On the following day the prisoner hired a cart and directed the owner to send it to the house of the prosecutor, telling the cart owner that the cart was to convey some furniture for the woman whom he would find there to another house in another street, the address of which he gave to the cart owner. On the arrival of the cart at the prosecutor's house the furniture was loaded upon it in the presence of the prosecutor's wife, the prisoner not being present. The prosecutor was absent on his duty as policeman, as he always was at that time of day. The furniture was removed to the house to which the prisoner had directed the carter to take it, and there placed in lodging rooms which the prosecutor's wife had previously engaged without the knowledge of the prosecutor. The prosecutor's wife accompanied the cart.

The prisoner was not present on the arrival of the furniture, nor did he appear at the lodgings on that day, but he came there the next day and spent the night with the prosecutor's wife, and lived with her in adultery in the lodgings furnished with the furniture in question for some days afterwards. This was the case for the prosecution.

The counsel for the prisoner submitted that there was no case, first, because he said there was no evidence that the prisoner knew that the female was a married woman, or that the furniture was the property of her husband; secondly, because he said that even if the prisoner did know these things, the part taken by him did not amount to a stealing, being only accessory to the act of the wife, which act itself could not be a stealing.

I held that there was evidence for the jury, but told the learned counsel that in the event of a conviction I would give him a case.

The learned counsel then called as a witness on behalf of the prisoner the wife of the prosecutor. She swore that she had frequently talked to the prisoner in the street, and also that he had once or twice visited her in her husband's house, but in her husband's absence, before she went away as above stated. She denied that any adultery had taken place before she left her home. She swore that she had never told the prisoner that she was married, and told him the furniture was hers, and that she was leaving in consequence of some unpleasantness, and she said that so far as she knew, the prisoner believed the furniture to be her own property. She admitted that she had lived with the prisoner as his wife at the lodgings to which the furniture was taken, and also that the lodgings were taken by her for the purpose of such adultery, with the knowledge of the prisoner.



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I told the jury that if they thought that the prisoner knew that the furniture belonged to the prosecutor, and that the wife had no authority to remove it, and if they also thought that with such knowledge he had assisted the wife to remove it with the intention of depriving the prosecutor of it, and of appropriating it to his own use jointly with the wife while living with her in adultery, they might convict him of stealing it, which they did.

I thereupon stated this case for the opinion of the Court of Criminal Appeal.

I discharged the prisoner upon his giving bail to appear for judgment if the Court should affirm the conviction.

JOHN B. ASPINALL,  
Recorder of Liverpool.

*Leofric Temple*, Q.C. for the prisoner.  
*Potter* for the prosecution.

By the COURT :

*Conviction affirmed.*

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REG. v. F. SMITH AND T. SMITH. (a)

*Lunatic—Ill-treatment of—Brother having the charge of—16 & 17  
Vict. c. 96, s. 9.*

*The two prisoners, brothers of the lunatic, took a house, and their mother and a lunatic sister lived with them. They supported the household, but received no payment for or on account of any special charge of their lunatic sister. The ill-treatment of the lunatic was fully proved.*

*Held, that the two prisoners were persons having the care, or charge, or concerned, or taking part in the custody, care, or treatment of a lunatic within the 16 & 17 Vict. c. 96, s. 9.*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

CASE stated for the opinion of this Court by the Vice-Chairman of Quarter Sessions for the parts of Lindsey, in the county of Lincoln.

The prisoners were convicted at the sessions holden on the 17th day of October, 1879, on the following indictment, which is framed upon the latter part of the 9th section of the statute 16 & 17 Vict. c. 96.

County of Lincoln, parts of Lindsey, to wit. The jurors for our lady the Queen, upon their oath present that Frederick Smith and Thomas Smith, on the 28th day of July, in the year of our Lord 1879, then having the care, or charge, or concerned, or taking part in the custody, care, or treatment of a certain lunatic, or alleged to be lunatic person called Emma Smith, did then abuse, ill-treat, and wilfully neglect such lunatic, or alleged lunatic, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

The evidence was that in April, 1879, the two prisoners took a house in Gainsborough as joint tenants; their mother and also their sister Emma, the lunatic, lived with them.

The prisoners worked at different occupations and supported the household, but they received no payment for or on account of any special charge of the lunatic about whom no proceedings had been taken in respect of the lunacy. The sister had not always been a lunatic, but there was no evidence to show when the lunacy commenced. The medical witnesses could not say how long she had been a lunatic, one stating "she had been so for some time," another that "he could not say the exact period, but certainly two months," although there was no doubt she was a lunatic at the time of the ill-treatment, which was fully proved.

She was removed to a lunatic asylum on the 29th day of July, 1879.

At the close of the evidence for the Crown it was objected by the counsel for the prisoners that the case was not within the above-mentioned section, inasmuch as the care and charge was by a brother of a sister, and came within the ruling of *Reg. v. Rundle* (6 Cox C. C. 549; 24 L. J. 126, M. C.), and, further, was to be distinguished from *Reg. v. Porter* (9 Cox C. C. 449; L. J. 126, M. C.), (a) inasmuch as the two prisoners did not "voluntarily" take upon themselves the charge of a lunatic within the ruling there laid down.

The Court was of opinion and decided that there was no legal obligation on the defendants to continue the care and charge of their sister after she became a lunatic, and that there was there-

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(a) In *Reg. v. Porter* the facts were that the care and charge of the lunatic were first taken by his father and mother, and at their death a sister took the care and charge of him. She went abroad, and then a brother took the care and charge of him, and for so doing received by a family arrangement 6s. or 7s. per week from rents of houses belonging to the lunatic, and it was held that the brother who took the care and charge of the lunatic came within the 16 & 17 Vict. c. 96, s. 9.

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fore a voluntary taking within the meaning of the Act, but reserved the point.

I request the opinion of the Court whether upon the evidence the prisoners were indictable under the above section of the statute, as "persons having the care or charge of a lunatic" within the latter part of the section.

WESTON CARCROFT AMCOTTS,  
Vice-Chairman.

The 16 & 17 Vict. c. 96, s. 9, enacts that if any superintendent, officer, nurse, attendant, servant, or other person employed in any registered hospital or licensed house, or any person having the care or charge of any single patient, or any attendant of any single patient, in any way abuse, or ill-treat, or wilfully neglect any patient in such hospital, or house, or such single patient, or if any person detaining or taking or having the care or charge, or concerned or taking part in the custody, care, or treatment of any lunatic, or person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic, or alleged lunatic, he shall be guilty of a misdemeanour, and shall be subject to indictment for every such offence, or to forfeit for every such offence on a summary conviction thereof before two justices any sum not exceeding 20*l*.

No counsel appeared on either side.

The Judges retired to consider, and on their return

Lord COLERIDGE, C.J. said that they were of opinion that the conviction should be affirmed. The case seemed to the Court to come within the direct words of the enactment (16 & 17 Vict. c. 96, s. 9), and that if any doubt could arise upon the question it was removed by the decision of this Court in *Reg. v. Potter* (*ubi sup.*).

*Conviction affirmed.*

## CROWN CASES RESERVED.

*Saturday, Feb. 28, 1880.*

(Before Lord COLERIDGE, C.J., DENMAN, J., POLLOCK, B., FIELD  
and STEPHEN, JJ.)

REG. v. CRAMP. (a)

*Malicious injury to person—Administering noxious thing—Intent to procure miscarriage—24 & 25 Vict. c. 100, s. 58.*

*The prisoner gave a female an ounce bottle full of oil of juniper, with intent to procure her miscarriage, and told her to take it in two doses, half at a time. She took half of it at one dose, and it caused her violent sickness. The bottle contained from 500 to 600 drops of oil of juniper. Oil of juniper is used as a diuretic in small quantities, from five to twenty drops; but when as much as half an ounce is taken it acts as an irritant, and produces violent purging and vomiting, which would have a tendency to procure miscarriage.*

*Held, that the causing to be taken, as much as was taken in this case, was the causing a noxious thing to be taken, within the meaning of the statute.*

*A thing may be a noxious thing within the statute, if when taken in a large quantity it proves injurious, although when taken in a small quantity it is beneficial.*

CASE reserved for the opinion of the Court by Denman, J.

John Lionel Cramp was tried and convicted before Denman, J. at the last Maidstone Assizes on an indictment which alleged that he "feloniously did unlawfully cause to be taken by one Ellen Elizabeth Verrall" a certain noxious thing, to wit, a large quantity, to wit, half an ounce, "of oil of juniper, with intent feloniously to procure the miscarriage of the said Ellen Elizabeth Verrall, against the form of the statute," &c.

The statute referred to is the 24 & 25 Vict. c. 100, s. 58.

It was proved that the prisoner did, with intent to procure the miscarriage of Verrall, who was with child by him, give her an ounce bottle full of oil of juniper, and tell her that she must take it, half of it at a time, in two doses.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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She accordingly on the following morning took half the contents of the bottle, which caused violent sickness, of which she informed the prisoner, who told her not to mention that he had given it, or he might be transported, and said that she would not now have a child.

She did not in fact miscarry, but was with child at the time of the trial.

There was evidence that the bottle given by the prisoner contained 500 to 600 drops of oil of juniper; that oil of juniper in small quantities, of from five to twenty drops, is commonly used without any bad effects as a diuretic and otherwise, but that taken in a dose of half an ounce it acts as a powerful stimulant and irritant, and produces violent purging and vomiting, which would have a tendency to produce miscarriage by reason of the shock to the system and the straining of the parts, consequent upon the purging or vomiting, and that a dose of half an ounce of oil of juniper would be a very dangerous dose to administer to a pregnant woman; but the danger would consist in the high probability of its causing miscarriage, which is always more or less dangerous to a woman, and not in the probability of any mischief of any other kind.

It was contended for the prisoner that there was no evidence of the prisoner having caused to be taken "a noxious thing" within the meaning of the statute, as the evidence only showed that oil of juniper would be noxious when taken in excess.

The learned Judge told the jury that if they were satisfied that the prisoner had given the prosecutrix the full ounce bottle of oil of juniper, and told her to take half with the intent of causing her to miscarry, and if they thought that such a dose of oil of juniper was a noxious thing, as being calculated to injure the health of the prosecutrix by causing her to miscarry, they might find him guilty, which they did.

No case was cited at the trial upon the question, but the counsel for the prisoner having subsequently called attention to the case of *Reg. v. Hennah* (13 Cox C. C. 547), the learned judge stated the above case for the Court of Criminal Appeal.

See also *Reg. v. Isaacs* (32 L. J. 52, M. C.; 9 Cox. C. C. 228).

If the Court thought that there was evidence that the half ounce of oil of juniper taken by the prosecutrix was a noxious thing within the meaning of sect. 58 of 24 & 25 Vict. c. 100, the conviction was to stand; if otherwise, to be quashed.

*D. Kingsford* (Mead with him) for the prisoner.—Sect. 58 of 24 & 25 Vict. c. 100, enacts that "Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing . . . and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her, or cause to be taken by her any poison or other noxious thing . . . shall be guilty of felony." The words "or other noxious thing" being coupled with the word "poison"

mean something *ejusdem generis* with poison, that is, something in its own nature poisonous or noxious, and not something which is only injurious when taken in large quantities. Cases cited: *Reg. v. Hennah* (*ubi sup.*); *Reg. v. Isaacs* (L. & C. 220; 9 Cox C. C. 228); *Reg. v. Perry* (2 Cox. C. C. 223.)

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*A. B. Kelly*, for the prosecution, was not called upon to argue. *Malicious in-jury to the person.*

LORD COLERIDGE, C.J.—I am of opinion that the conviction should be affirmed. The material words of the statute 24 & 25 Vict. c. 100, s. 58, are “Whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing,” shall be guilty of felony. In this case the prisoner caused to be taken by the woman a quantity of oil of juniper with intent to procure miscarriage, a quantity which did cause violent sickness, and which if the whole supplied had been taken, might have done more injury. The question is whether he was guilty of administering a poison or other noxious thing with intent to procure miscarriage within the meaning of the statute. The intent was proved, and it was further proved that oil of juniper is noxious when administered in the quantity proved to have been taken in this case. Then why was there not the administration of a noxious thing? It was said that “noxious thing” in the statute means some kind of poison, and probably that is so. But what is a poison? It is something which when administered is injurious to health or life. There is hardly any active drug which taken in large quantities may not be so, and, on the other hand, there is hardly any poison which may not in small quantities be useful and salutary. It is therefore in each case a question of the quantity and the circumstances under which the drug is administered. It is in each case a question for the jury whether the thing, administered as it was under the circumstances, is a “noxious thing.” Here the thing as administered was proved to be noxious, and the intent was proved to be criminal. The ingredients of the offence were therefore established. None of the cases cited touch the question. In *Reg. v. Isaacs* the drug was not shown to be capable of doing harm. In *Reg. v. Perry* the quantity administered was so small as to be innocuous; and in *Reg. v. Hennah* (*ubi sup.*) the thing taken was not noxious in the quantity administered. We are not precluded therefore by authority from holding, on principle and good sense, that if a person causes to be taken, with intent to produce miscarriage, something which in the way it is administered is noxious, he causes a noxious thing to be taken. The conviction therefore will be affirmed.

DENMAN, J.—I am of the same opinion. I never had any serious doubt that where a person administers, with the intent in the section, a thing in such a large quantity as to be noxious, though innocuous when taken in a small quantity, he commits an offence within the enactment.

POLLOCK, B. concurred.



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FIELD, J.—I am of the same opinion. The section speaks, first, of poisons; secondly, of other noxious things. If the thing administered is a known recognised poison, I think the offence may be committed, though the quantity given is so small as to be incapable of doing harm. The thing administered in this case was oil of juniper, and the quantity taken was proved to be noxious. I think it was therefore a noxious thing within the meaning of the statute.

STEPHEN, J.—I am of the same opinion. The case depends upon the same principle as *Reg. v. Hennah*. It is clear to me that the causing to be taken half an ounce of oil of juniper, and which produced violent sickness, was causing to be administered a noxious thing within the meaning of the statute. As to the administration of "poison," certain things are known as poisons, and as to these possibly the administration of a small quantity with the criminal intent would be within the statute.

*Conviction affirmed.*

Solicitors for prosecution, *Oripps and Son*, Tunbridge Wells.  
Solicitor for prisoner, *J. L. Langham*, Uckfield.

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## COURT OF CROWN CASES RESERVED.

*Saturday, Feb. 28, 1880.*

(Before Lord COLERIDGE, C.J., DENMAN, J., POLLOCK, B., FIELD, J.,  
and STEPHEN, J.)

REG. v. R. H. BISHOP. (a)

*Lunatic—Receiving into unlicensed house persons suffering from hysteria, &c.—8 & 9 Vict. c. 100, ss. 44-90.*

*Defendant was indicted under 8 & 9 Vict. c. 100, s. 44, for receiving two or more lunatics into a house not duly licensed or registered. Defendant advertised for patients suffering from "hysteria, nervousness, and perverseness," and honestly believed and on reasonable grounds that no one of her patients was a lunatic. There was conflicting evidence as to whether any of the patients were lunatics or not. The learned judge directed the jury that the word "lunatic," as defined by the Act, would include a*

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.

*person whose mind was so affected by disease that it was necessary for his own good to put him under restraint.*

*The jury convicted the defendant, but found that the defendant honestly and on reasonable grounds believed that no one of her patients was a lunatic.*

*Held, that the direction of the learned judge was correct, and that the defendant's belief was immaterial.*

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CASE reserved for the opinion of this Court by Stephen, J.

Rhoda Hulse Bishop was tried before me at Northampton on the 20th and 21st days of January, upon an indictment charging her with an offence against the 44th section of 8 & 9 Vict. c. 100, by receiving into her house two or more lunatics, such house not being an asylum or hospital registered under the Act, or a house duly licensed under the Act.

It was proved on the trial that the defendant received into her house several young women for the purpose of medical treatment. Her stepdaughter, who was called as a witness on her behalf, and who took part in the management of the house, described them as patients suffering from "hysteria, nervousness, and perverseness," and it was proved that she advertised in newspapers for patients so described. She had besides these patients one inmate who was admitted to be a lunatic, with regard to whom she had complied with the requisitions of sect. 90 of the Act.

There was conflicting evidence upon the question whether any of the other patients were lunatics or not, and as to the nature and degree of restraint to which they were subjected, and there was strong evidence to show that the defendant believed in good faith, and on reasonable grounds, that no one of them was a lunatic, but that all were suffering only under "hysteria, nervousness, or perverseness."

I read to the jury the interpretation of "lunatic" given in sect. 114: "Lunatic shall mean every insane person, and every person being an idiot, or lunatic, or of unsound mind," and I told them that in my opinion these words would include everyone whose mind was so affected by disease that it was necessary for his own good to put him under restraint.

I also told them that in my opinion the words "receive one or more lunatics" meant receive "as lunatics, and in order to be treated as lunatics are treated in asylums," and I gave them this direction: "In order that the defendant may be convicted the jury must be of opinion that at least one other patient in the house besides the admitted lunatic was either an insane person, or an idiot, or a lunatic, or of unsound mind when received, and that such person was received into the house to be treated as a lunatic is treated in an asylum."

I also told them that I was of opinion that if one other such person besides the admitted lunatic was so received, an honest belief on the part of the defendant that that person was not a

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lunatic would be immaterial; but at the request of the counsel for the defendant, I asked them, if they convicted the defendant, to find specially whether she believed honestly and on reasonable grounds that any person so received was not a lunatic.

The jury found the defendant guilty, but they found that she did honestly and on reasonable grounds believe that no one of her patients was a lunatic (except of course the admitted lunatic).

I directed the defendant to enter into her own recognisances to come up for judgment if called upon in order that she might have an opportunity of complying with the provisions of the Act, but I reserved for the determination of the Court for Crown Cases Reserved the question whether my direction to the jury was right, in order that if it is wrong the conviction may be set aside.

J. F. STEPHEN.

8 & 9 Vict. c. 100 (An Act for the Regulation of the Care and Treatment of Lunatics), sect. 44:

It shall not be lawful for any person to receive two or more lunatics into any house unless such house shall be an asylum or an hospital registered under this Act, or a house for the time being duly licensed under this Act, or one of the Acts hereinbefore repealed; and any person who shall receive two or more lunatics into any house other than a house for the time being duly licensed, or an asylum or an hospital duly registered shall be guilty of a misdemeanour.

Sect. 90:

No person (unless he be a person who derives no profit from the charge, or a committee appointed by the Lord Chancellor) shall receive to board or lodge in any house other than an hospital registered under this Act, or an asylum or a house licensed under this Act, or under one of the Acts hereinbefore repealed, or take the care or charge of any one patient as a lunatic or alleged lunatic without the like order and medical certificates in respect of such patient as are hereinbefore required on the reception of a patient (not being a pauper) into a licensed house, &c.

No counsel was instructed for the defendant.

*Mellor*, Q.C. (*Harris* with him), for the prosecution.—The conviction was right. The object of the 8 & 9 Vict. c. 100, s. 44, was to prevent lunatics being received into unlicensed or unregistered houses. It is a positive and unqualified enactment that it shall not be lawful so to do, and there is nothing in it with regard to the keeper's knowledge or his belief that the persons received are lunatics or not. The jury found that the persons received by the defendant were lunatics, after the learned judge had directed them that the word "lunatic" would include a person whose mind was so affected by disease that it was necessary for his own good to put him under restraint. The object of the Act was that keepers of such houses should be under the supervision of the Commissioners in Lunacy.

LORD COLERIDGE, C.J.—I think the conviction was right. If the only question is whether the knowledge of the parties so receiving lunatics is material under sect. 44, the case is quite clear.

DENMAN, J.—I also think that the conviction should be sustained. The question reserved is whether the fact that the defen-

dant honestly thought that the person was not a lunatic was a defence. If we were to hold that it was, the object of the statute might be frustrated.

POLLOCK, B.—I agree that the conviction ought to be sustained, and I wish it to be understood that we affirm the direction of my brother Stephen that the word "lunatic" would include a person whose mind was so affected by disease that it was necessary for his own good to put him under restraint, in the sense that by restraint is meant restraint of the same kind as that to which lunatics are subject in asylums. The further direction that "in order that the defendant might be convicted the jury must be of opinion that at least one other patient in the house beside the admitted lunatic was either an insane person, or a lunatic, or of unsound mind when received into the house to be treated as a lunatic is treated in an asylum," protects hysterical patients or patients suffering from any disturbance of mind for which it would be advisable that they should be restrained in one sense temporarily. With regard to the point whether the knowledge or absence of knowledge of the keeper of the house as to the lunacy of the persons received is material, I am clearly of opinion that it is not.

FIELD, J.—I also think that the conviction should be affirmed. If it were necessary to decide who are or who are not lunatics I should wish to consider, but it is not in this case. The object of the Act was to place the keepers of all such houses under a competent authority.

STEPHEN, J.—I am of the same opinion. Upon the question whether knowledge upon the part of the defendant was essential to the committal of the offence under the Act I entertained no doubt at the trial, and I do not now. I reserved the point, as I understood that the Commissioners in Lunacy wished to obtain the solemn opinion of the Court upon this enactment, as they considered the case of great importance. Upon the definition of the term "lunatic," upon reflection I may say that I do not think that the case submitted contained quite as much as it ought of what I said to the jury on the subject. I read to them the interpretation of the term as given in sect. 14 of the Act; and I then told them that, in my opinion, those words were sufficiently wide to include every person who was, by reason of mental disease, in such a condition that it was necessary or advisable, at any rate for his or her own good, to subject him or her to the restraint of a lunatic asylum. I added that I did not say that, by way of legal definition of the word which bound them, that it was not a positive direction to them; but that upon the whole it was the best construction I could put on the words of the Act which said that "lunatic" shall mean every insane person, and every person being an idiot or lunatic, or of unsound mind; in other words it shall mean not only lunatic but insane and idiot, and persons of unsound mind. I said that I thought there was a difference between a lunatic and an insane

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REG. *person and a person of unsound mind, and that persons of*  
*unsound mind, not being lunatics, must be such that it was neces-*  
*sary for their own good to subject them to that kind of restraint*  
*which is exercised in lunatic asylums over persons afflicted with*  
*lunacy.*

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*Conviction affirmed.*

## QUEEN'S BENCH DIVISION.

*Saturday, Feb. 21, 1880.*

(Before LUSH and MANISTY, JJ.)

REG. v. TRUELOVE. (a)

*Proceedings in the nature of criminal proceedings—Order for destruction of obscene books—Death of informer before hearing by magistrate—Abatement of proceedings—20 & 21 Vict. c. 88, ss. 1 and 4.*

*When proceedings in the nature of a criminal prosecution are set on foot by a sufficient information laid before a magistrate, and he issues a summons on such information, the death of the informer causes no abatement of the proceedings.*

*One J. G. laid an information against one E. T. that he had on his premises certain obscene books, &c., fit to be destroyed; a summons was issued by the then sitting magistrate at B. police court to the said E. T. to show cause why the said books, &c., should not be destroyed. Three days after the return of the summons, but several months before the case was heard, the said J. G. died. When the case came on no objection was taken by the said E. T. on the ground of the death of the informer, and an order was made for the destruction of the books. On appeal against this order to quarter sessions, the Court confirmed the order, but granted a case on the question whether on the death of the informer there was not an abatement of the proceedings, such as to invalidate the order for the destruction of the books.*

*Held, that the order was good, since the proceedings were quasi-criminal in their nature, and as there had been a sufficient information on which to ground them, the death of the informer did not cause an abatement of such proceedings.*

(a) Reported by W. P. EVERSLY, Esq., Barrister-at-Law.

**T**HIS was a case stated by justices in quarter sessions for the county of Middlesex.

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Death of in-  
former.*

1. On the 15th day of May, 1877, James Vaughan, Esq., one of the magistrates of the police courts of the metropolis, sitting at the police court, Bow-street, in the county of Middlesex, and within the metropolitan police district, upon the complaint of one John Green, granted a special warrant under the statute 21 & 22 Vict. c. 83, s. 1, directed to Henry Wood, one of the inspectors of the metropolitan police, to search the premises of Edward Truelove, of 256, High Holborn, in the county of Middlesex, and seize all obscene books, papers, or writings found on his premises.

2. On the said 15th day of May, 1877, the said H. Wood, by virtue of the said warrant, entered the said premises, and therein seized 1212 copies of a pamphlet entitled "Individual, Family, and National Poverty," and 292 copies of a pamphlet entitled "Moral Physiology."

3. On the 16th day of May, 1877, Sir James Ingham, Knight, one of the magistrates of the police courts of the metropolis, granted a summons requiring the said E. Truelove, as occupier of the said premises, to appear on the 22nd day of May, 1877, at the said police court, Bow-street, to show cause why the said pamphlets seized on his premises should not be destroyed.

4. On the 22nd day of May, 1877, the said summons came on to be heard at the said police court, and the hearing thereof was adjourned from time to time.

5. On the 4th day of Oct. 1878, Sir J. Ingham, Knight, made an order adjudging the said pamphlets to be obscene, and ordering that all the said pamphlets be destroyed within seven days.

8. Against this order the said E. Truelove appealed, and the said appeal came on to be heard on the 26th day of April, 1879.

9. It then appeared in evidence that J. Green, the complainant, died on the 25th day of May, 1877.

10. At the close of the respondent's case the counsel for the appellant made the objection that, after the death of the said complainant, J. Green, all proceedings against the appellant lapsed, as there was then no person in the position of prosecutor. The counsel for the respondent contended that the proceedings did not so lapse, and that, even if they did, the Court could not give effect to the objection, as it was not included in the grounds of appeal. The appellant replied that in the absence of a prosecutor or complainant the Court of Quarter Sessions had no power to deal with the order, and the objection being one to jurisdiction, it was not necessary for it to be included in the grounds of appeal.

12. The learned Assistant Judge then asked appellant's counsel whether an application had been made to the magistrate who made the order to substitute another prosecutor for the said John Green, deceased. On being answered in the negative, the learned Assistant Judge was clearly of opinion that the appellant's objec-



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tion was a good one, and the Court of Quarter Sessions thereupon so decided, but held that they could not give effect to it, as it was not included in the grounds of appeal.

13. The Court thereupon heard the appellant's counsel upon the merits, and being of opinion that the said pamphlets were obscene within the meaning of the Act, affirmed the order with costs. They consented, however, to grant a case upon the question of the absence of the appellant's objection from the grounds of appeal, and although they had no doubt upon the point, yet, as a case was being stated, he permitted the question itself as to the lapse of proceedings, to be also raised.

The questions for the Court were :

1. Whether the proceedings against the appellant lapsed upon the death of the said complainant John Green ?

2. Whether, if they did so lapse, the fact that the objection was not included in the appellant's grounds of appeal precluded the Court of Quarter Sessions from giving effect to the said objection ?

If the Court be of opinion that the proceedings did lapse upon the death of the said John Green, and that it was not necessary that the objection should appear in the grounds of appeal, then the order to be quashed.

If the Court should be of opinion that the proceedings did not so lapse, then the order to be affirmed.

If the Court should be of opinion that the proceedings did so lapse, but that the objection should have been a ground of appeal, then the order to be affirmed.

The following is a copy of the warrant to search the premises of the appellant, issued by the sitting magistrate at Bow-street police court :

*A Special Warrant.*

County of Middlesex and Metropolitan Police District [to wit].—B. J. T. L.—Police Court, Bow-street.—To Henry Wood, one of the Inspectors of the Metropolitan Police Force.

Whereas complaint upon oath hath this day been made to me, the undersigned, a metropolitan police magistrate, being one of the magistrates of the police courts of the metropolis, sitting at the police court, Bow-street, in the county of Middlesex, and within the metropolitan police district, by John Green, that the said John Green has reason to believe, and does believe, that divers obscene books are kept by Edward Truelove, in a certain house or shop situate and being No. 256, High Holborn, in the said county of Middlesex, and in the said district, for the purpose of sale, and of being otherwise published for the purpose of gain.

And whereas the said John Green has also on this day stated on oath before me, the said magistrate, sitting at the police court aforesaid, that divers articles of the like nature, to wit, certain obscene books, entitled "Individual, Family, and National Poverty," and "Moral Physiology," have, on the 14th day of May, 1877, been sold at the said house or shop, so as to satisfy me, the said magistrate, that the belief of the said John Green is well founded, and the said John Green having produced before me the said books so sold at the said house or shop as aforesaid, I, the said magistrate, being satisfied that the belief of the said John Green is well founded, and that the said articles so kept for the purpose aforesaid are of such a character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such, do authorise and require you, Henry Wood, one of the inspectors of the metropolitan police force, into such house, with such assistance as may be necessary, to enter in the daytime, and, if necessary, to use force by breaking open doors or otherwise, and to search for and seize all such obscene books as aforesaid in such

house, and to bring all the articles so seized before me, or such other of the magistrates of the police courts of the metropolis, as shall then be sitting at the police court, Bow-street, aforesaid, and for so doing this shall be your sufficient warrant.

(Signed)

J. VAUGHAN.

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By sect. 1 of 20 & 21 Vict. c. 83 :

It shall be lawful for any metropolitan magistrate or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe, and does believe, that any obscene books, papers, writings, prints, pictures, drawings, or other representations are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, for the purposes of sale, distribution, or exhibition for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place, so as to satisfy such magistrate or justices that the belief of the said complainant is well founded, and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanour, and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the daytime, and if necessary, to use force, by breaking open doors or otherwise, and to search for and seize all such books, &c., found in such house, &c., and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction, and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house, or other place which may have been so entered by virtue of the said warrant, to appear within seven days before such police stipendiary magistrate or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed ; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles, or any of them, are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices . . . to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal, unless notice of appeal . . . be given, and such articles shall be in the meantime impounded.

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By sect. 4 :

Any person aggrieved by any act or determination of such magistrate or justices in or concerning the execution of this Act may appeal to the next general or quarter sessions for the county, &c., in or for which such magistrate or justices shall have so acted, giving to the magistrate or justices of the peace whose act or determination shall be appealed against notice in writing of such appeal, and of the grounds thereof, within seven days after such act or determination, and before the next general or quarter sessions, and entering within such seven days into a recognisance, with sufficient security, before a justice of the peace for the county, &c., in which such act or determination shall have taken place, personally to appear and prosecute such appeal, and to abide the order of and pay such costs as shall be awarded by such court of quarter sessions, &c., and the court at such general or quarter sessions shall hear and determine the matter of such appeal, and shall make such order therein as shall to the said court seem meet ; and such court upon hearing and finally determining such appeal, shall and may, according to their discretion, award such costs to the party appealing or appealed against as they shall think proper.

*Mead*, for the respondent. These proceedings, which are under Lord Campbell's Act, are criminal, not civil ; the prosecutor has no control over the suit after the magistrate has once acted upon his information, though such proceedings must be set in motion by a nominal prosecutor. It has been found that the publication of these books was a misdemeanour, upon which the magistrate founded his order, and issued a special warrant for their

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destruction. Sect. 1 of 20 & 21 Vict. c. 83, is in the respondent's favour. If this case is civil and not criminal in its nature, the appellant must prove that the informer was solely seised of the cause, and had absolute control over it. [LUSH, J.—The complainant was dropped altogether in the proceedings after the complaint; the informer cannot claim any reward or treat it as a personal matter; the defendant must answer this point.]

*W. A. Hunter* (*J. M. Davidson* with him) for the appellant.—The prosecutor is a substantial party in the proceedings, and reappears in sect. 4 of 20 & 21 Vict. c. 83, in a very important aspect, as being the "party appealing or appealed against" to whom costs may be awarded. Now, in this very order of sessions costs are awarded to the informer as "the party appealed against." The case of *Reg. v. The Justices of Hants* (1 B. & Ad. 654) is in the appellant's favour on this point. No costs can be recovered against justices: (*Reg. v. Goodall*, L. Rep. 9 Q. B. 557; 43 L. J. 119, M. C.) [MANISTY, J.—When justices themselves act as prosecutors on appeal, costs may sometimes be given against them. LUSH, J.—Suppose *J. Green* died after the return of the summons, as was the fact, but on the hearing of the case some other person did proceed with the prosecution, is not he the person to whom such costs might be paid?] Such person must be the informer; he did not appear, and no person appeared for him at the hearing of the case, and as the statute requires him, at any rate in the matter of costs, to be present to the last, if he dies before the matter is finished, all proceedings based upon his information at once abate.

*Mead* in reply.—Proceedings do not abate on the death of the informer: (*Reg. v. Justices of Leicestershire*, 15 Q. B. 88.) This is clearly a criminal matter, in which the Crown is prosecutor and principal party. Where an Attorney-General dies after laying an information, but before the matter is ended, there is no abatement: (*Waller v. Hanger*, Bulst. 261; Bacon's Abridgment, tit. "Abatement.") The search-warrant of the magistrate shows that these proceedings are in the nature of a criminal suit; if such suits were settled by the death or non-appearance of the informer, he might settle the matter for a bribe, and the Crown could not put a stop to or punish such conduct.

LUSH, J.—I am of opinion that there is no objection to the confirmation of the order of the magistrate. This matter has not the character of a civil proceeding; the informer gives information on behalf of the public, and the case then becomes almost a completely criminal proceeding; the warrant of the magistrate is almost in its effects a search-warrant. It would be very remarkable, and very prejudicial, if the presence of the informer were material to the proceeding at all its stages, and it were in his power to put a stop to the prosecution. The complaining party cannot by making terms with the defendant prevent the magistrate from going on with the case; it is the duty of the magistrate to go on with the prosecution, and make his orders;

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consequently the informer's death in no way causes the proceedings to lapse. The statute says nothing to prevent this course. The magistrate once put in motion upon sufficient information must determine if the things are fit to be dealt with, and, if so, destroyed. As for the appeal clause, sect. 4 (*ubi sup.*), I think it strengthens the case of the respondent; in it there is no provision for giving notice of appeal to any one except the magistrates, and the section does not notice any particular party, but only the "party appealing or appealed against," who might be the magistrate himself. I can therefore find nothing in the statute to make the original prosecuting party always the prosecuting party; the matter is of the nature of a criminal prosecution on behalf of the Crown; and who the "party appealing or appealed against" is can be ascertained by the magistrates. The sessions have confirmed the order, and so they put it to us. I am of opinion the proceedings did not lapse.

MANISTY, J.—I am of the same opinion.

*Rule discharged with costs.*

Solicitors for the appellant, *Harper, Broad, and Battcock.*

Solicitor for the respondent, *The Solicitor to the Treasury.*

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## QUEEN'S BENCH DIVISION.

*Friday, Feb. 20, 1880.*

(Before LUSH and MANISTY, JJ.)

MULLINS v. TREASURER OF THE COUNTY OF SURREY. (a)

*Conveyance of prisoners to prison—Liability for expense—27 Geo. 2, c. 3—11 & 12 Vict. c. 42—28 & 29 Vict. c. 126—40 & 41 Vict. c. 21.*

*The plaintiff, a police constable, obtained from a justice an order upon the defendant under 27 Geo. 2, c. 3, s. 1, and 11 & 12 Vict. c. 42, s. 26, for the expenses of conveying two prisoners, one summarily convicted and the other committed for trial, from the police office to the prison. The defendant refused payment of*

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

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*the amount on the ground that these expenses must be defrayed by the Treasury under the Prisons Act, 1877.*

*Held, upon a special case stated in an action to recover these expenses, that the statutes first mentioned do not impose them upon the prison authorities as defined by sect. 5 of the Prison Act, 1865; and that therefore these expenses are not included amongst those of the maintenance of a prisoner mentioned in sect. 57 of the Prisons Act, 1877.*

**T**HIS was a special case stated by consent under the rules of the Supreme Court, Order 34, r. 1:

1. The plaintiff is one of the constables of the Metropolitan Police Force. On the 12th day of August, 1879, one Lydia Burnard was duly convicted by G. Chance, Esq., one of the magistrates of the police courts of the metropolis, sitting at the Police Court at Lambeth, in the county of Surrey, for that she, the said Lydia Burnard, was guilty of being drunk, disorderly, and making use of obscene language contrary to the statute, and the said magistrate did duly adjudge the said Lydia Burnard for her said offence, to be imprisoned in Her Majesty's prison, situate at Westminster, in the county of Middlesex, and there kept to hard labour for the space of fourteen days, and the said magistrate, by a warrant of commitment under his hand and seal, in the Form P. 1, in the schedule to the 11 & 12 Vict. c. 43, addressed to the plaintiff, commanded the plaintiff to take the said Lydia Burnard, and her safely convey to the said prison, and there to deliver her to the keeper thereof.

2. The plaintiff did as commanded by the said warrant, and, as soon as the same was given to him, take the said Lydia Burnard from the said police court and her safely convey to the said prison, and there deliver her to the keeper thereof.

3. The said Lydia Burnard had not at any time from the time when she was so taken by the plaintiff as aforesaid, to or at the time when she was so delivered by the plaintiff or at any other time, goods or money sufficient to bear the charges of herself the said Lydia Burnard and of the plaintiff who so conveyed her or any part thereof.

4. Afterwards, namely, on the 14th day of August, 1879, the said magistrate sitting as aforesaid, did at the request of the plaintiff ascertain the sum which ought to be paid to the plaintiff for so conveying the said Lydia Burnard to the said prison to be the sum of 1s. 6d., and did thereupon then at the police court aforesaid, according to the form of the statute 11 & 12 Vict. c. 42, s. 26, in such case made and provided, make an order upon and directed to the defendant as and then being the treasurer of the said county of Surrey, and by which said order the said magistrate then ordered the defendant as such treasurer as aforesaid to pay to the plaintiff as such constable as aforesaid, the said sum of 1s. 6d., according to the form of the statute in such case made and provided.



5. The said plaintiff afterwards, and before the commencement of this action—to wit, on the 15th day of August, 1879, duly produced and presented the said order to the defendant, then being such treasurer as aforesaid, for payment, who then had in his hands as such treasurer sufficient money of the said county, arising out of the county rate of the said county; but the said defendant refused to pay the said sum, or any part thereof, to the plaintiff, on the ground that the liability to pay such sum had been transferred from the defendant to the Secretary of State by the Prison Act, 1877 (40 & 41 Vict. c. 21).

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6. On the 13th day of August, 1879, John Allcroft was duly committed by G. Chance, Esq., one of the magistrates of the police courts of the metropolis, sitting at the Police Court at Lambeth, in the said county of Surrey, to take his trial for felony committed in the said county, and the said magistrate, by a warrant of commitment under his hand and seal, in the form P. 1, in the schedule to the 11 & 12 Vict. c. 43, addressed to the plaintiff, commanded the plaintiff to take the said John Allcroft, and him safely convey to Her Majesty's prison at Clerkenwell, in the county of Middlesex, and there to deliver him to the keeper thereof, who was commanded to receive the said John Allcroft into the said prison, and there safely keep him until he should thence be delivered by due course of law.

7. The plaintiff did as commanded by the said warrant, and, as soon as the same was given to him, take the said John Allcroft from the said police court, and him safely convey to the said prison, and there deliver him to the keeper thereof.

8. The said John Allcroft had not at any time from the time when he was so taken by the plaintiff as aforesaid to, or at the time when he was so delivered by the plaintiff, or at any other time, goods or money sufficient to bear the charges of himself, the said John Allcroft, and of the plaintiff, who so conveyed him, or any part thereof.

9. Afterwards, namely on the 14th day of August, 1879, the said magistrate sitting as aforesaid did, at the request of the plaintiff, ascertain the sum which ought to be paid to the plaintiff for so conveying the said John Allcroft to the said prison to be the sum of 1s. 6d., and did thereupon then at the said police court aforesaid, according to the form of the statute 11 & 12 Vict. c. 42, s. 26, make an order upon and directed to the defendant, as and then being treasurer of the said county of Surrey, the said order being in a form to the like effect as the form P 2 in the schedule in the said last-mentioned Act, and by which said order the said magistrate then ordered the defendant, as such treasurer as aforesaid, to pay to the plaintiff, as such constable as aforesaid, the said sum of 1s. 6d., according to the form of the statute in such case made and provided.

10. The said plaintiff afterwards, and before the commencement of this action, to wit, on the 15th day of August, 1879, duly produced and presented the said order to the defendant, then



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being such treasurer, for payment, who then had in his hands as such treasurer sufficient money of the said county, arising out of the county rate of the said county; but the said defendant refused to pay the said sum of 1s. 6d., or any part thereof, to the plaintiff, on the ground that the liability to pay such sum had been transferred from the defendant to the Secretary of State under the Prisons Act, 1877 (40 & 41 Vict. c. 21).

11. The questions for the opinion of the Court are: Whether the liability to pay the said sum of 1s. 6d., for conveying the said Lydia Burnard to prison, is transferred from the defendant to the Secretary of State by the Prisons Act, 1877. Whether the liability to pay the said sum of 1s. 6d., for conveying the said John Allcroft to prison, is transferred from the defendant to the Secretary of State by the said Prisons Act.

12. If the Court shall answer both these questions in the negative, then judgment is to be entered for the plaintiff, with costs, including the costs of this case; but if the Court shall answer both in the affirmative, then judgment is to be entered for the defendant, with costs, including the costs of this case. If the Court shall answer one question in favour of the plaintiff, and the other in favour of the defendant, then judgment is to be entered accordingly, but without costs.

By 27 Geo. 2, c. 3, sect. 1, it is enacted:

That when any person, not having goods or money, within the county where he is taken, sufficient to bear the charges of himself and of those who convey him, is committed to jail or the House of Correction by warrant from any justice or justices of the peace, then on application by any constable or other officer who conveyed him to any justice of the peace for the same county or place, he shall, upon oath, examine into and ascertain the reasonable expenses to be allowed such constable or other officer, and shall forthwith, without fee or reward by warrant under his hand and seal, order the treasurer of the county or place to pay the same, which the said treasurer is hereby required to do, as soon as he receives such warrant; and any sum so paid shall be allowed in his accounts.

By 11 & 12 Vict. c. 42, sect. 26, it is enacted:

That the constable or any of the constables or other persons to whom the said warrant of commitment shall be directed shall convey such accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him, together with such warrant, to the gaoler, keeper, or governor of such gaol or prison, who shall thereupon give such constable or other person so delivering such prisoner into his custody a receipt for such prisoner, setting forth the state and condition in which such prisoner was when he was delivered into the custody of such gaoler, keeper, or governor. And in all cases where such constable or other person shall be entitled to his costs or expenses for conveying such person to such prison as aforesaid, it shall be lawful for the justice or justices who shall have committed the accused party, or for any justice of the peace in and for the said county, riding, division, or other place of exclusive jurisdiction wherein the offence is alleged in the said warrant to have been committed, to ascertain the sum which ought to be paid to such constable or other person for conveying such prisoner to such gaol or prison, and also the sum which should reasonably be allowed him for his expenses in returning, and thereupon such justice shall make an order upon the treasurer of such county, riding, division, liberty, or place of exclusive jurisdiction, or if such place of exclusive jurisdiction shall be contributory to the county rate of any county, riding, or division, then upon the treasurer of such county, riding, or division respectively; or in the county of Middlesex, upon the overseers of the poor of the parish or place within which the offence is alleged to have been committed; for payment to such constable or other person of the sums so ascertained to be payable to him in that behalf; and the said treasurer or overseers, upon such order being produced to him or them

respectively, shall pay the amount thereof to such constable or other person producing the same, or to any person who shall present the same to him or them for payment: Provided nevertheless that if it shall appear to the justice or justices by whom any such warrant of commitment against such prisoner shall be granted as aforesaid that such prisoner hath money sufficient to pay the expenses or some part thereof, of conveying him to such gaol or prison, it shall be lawful for such justice or justices, in his or their discretion, to order such money or a sufficient part thereof to be applied to such purpose.

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By the Prisons Act 1865 (28 & 29 Vict. c. 126), sect. 5, the prison authorities, for the purposes of that Act, are declared to be :

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1. As respects any prison belonging to any county, except as hereinafter mentioned, or to any riding, division, hundred, or liberty of a county, having a separate court of quarter sessions, the justices in quarter sessions assembled.

By the Prison Act, 1877 (40 & 41 Vict. c. 21), s. 4:

All expenses incurred in respect of the maintenance of prisons to which this Act applies, and of the prisoners therein, shall be defrayed out of moneys provided by Parliament.

By sect. 28:

A prisoner shall be deemed to be in legal custody whenever he is being taken to or from, or whenever he is confined in any prison in which he may be lawfully confined, or whenever he is working outside or is otherwise beyond the walls of any such prison in the custody or under the control of a prison officer belonging to such prison, and any constable or other officer acting under the order of any justice of the peace or magistrate having power to commit a prisoner to prison, may convey a prisoner to or from any prison to or from which he may be legally committed or removed, notwithstanding such prison may be beyond the constablewick or other jurisdiction of such constable or officer, in the same manner and with the same incidents as if such prison were within such constablewick or other jurisdiction.

By sect. 57:

A "prisoner," for the purposes of this Act, means any person committed to prison on remand, or for trial, safe custody, punishment, or otherwise; and "the maintenance of a prisoner" includes all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would, if this Act had not passed, have been payable by a prison authority; with this proviso, that nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise, which he would have been liable to pay if this Act had not passed.

By sect. 61:

In this Act the expression "prison authorities," "justices in sessions assembled," and "visiting justices," shall respectively have the same meaning in relation to any prison as they have in the Prisons Act, 1865, and expressions defined in that Act have the same meaning also in this Act.

The *Solicitor-General* (Sir H. Giffard, Q.C.), with him *Avory*, argued for the plaintiff.—These sums of money are payable to the plaintiff by the defendant under 27 Geo. 2, c. 3, s. 1, but not out of the funds of the prison authority of the county. The expenses transferred to the Consolidated Fund by the Prison Act of 1877 are only those which were before payable by the prison authorities, who are defined to be the justices at quarter sessions. These expenses, too, are limited to the period of each prisoner's incarceration, as appears from sect. 4 of the Prison Act, 1877, and do not include those of conveyance to prison. "From the period of

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his committal to prison," which are the words used in sect. 57, must mean from his reception in prison.

*Herschell*, Q.C. (with him *E. Clarke*) for defendant.—By the Prison Act, 1877, all prisons are transferred from the management of the previous prison authorities to that of the Home Secretary, and provision is made amongst other things for commitments to distant prisons, in cases which were before required to be only to prisons in the county. This may involve additional expense in the conveyance of prisoners, although generally economy, which is the object of the Act, may be advanced thereby; and it would be at all events reasonable that this liability should be borne by the same fund which secures the advantage of the transfer of management; and the only difficulty in so interpreting the 57th section is the payment of these expenses by the treasurer of the county. He, however, pays the expenses incurred by the prison authority, and the omission of express mention of that authority does not necessarily imply that the treasurer is to pay the money out of a different fund. The 28th section shows that the Act is not limited in its application to the period or place of actual incarceration. The 26th section of 11 & 12 Vict. c. 42, renders the prisoner himself liable for his conveyance, instead of the treasurer of the county or overseers, in case of his having sufficient money. If, therefore, these expenses are not transferred by the Prison Act, 1877, the proviso of sect 57 must be entirely superfluous.

The *Solicitor-General* in reply.—The proviso of this sect. 57 must be assumed to have been inserted merely *ex abundanti cauteâl*: at all events its inapplicability to any possible state of circumstances is no sufficient reason for overriding the express words of the enacting part of the section.

LUSH, J.—This is a matter which is not free from doubt, but I am inclined to accept the arguments of the *Solicitor-General* and give judgment for the plaintiff. It is clear from the statutes passed before the Prison Act, 1877, that the expenses of the kind incurred in this case were payable by the treasurer of the county without reference to the prison authority, except when the prisoner was himself able to pay the amount. This Prison Act imposes the future expenses of prisons and of the prisoners therein upon the Treasury, and we have to look at sect. 57 to see what those expenses are: the words most nearly applying to the matters in dispute are for safe conduct and removal from one place of confinement to another, or otherwise, from the period of a prisoner's committal to prison until his discharge, as would have been payable by a prison authority. These were expenses not literally payable by a prison authority, and we must consider whether the section can include anything more. It is no doubt natural to expect from a proviso that it should relate to something referred to in the enactment; but I cannot say that it is enough of itself to imply such an enactment, when other provisions are inconsistent therewith. Looking at the 4th section, the Act appears to relate to the period of a prisoner's being actually in

prison, and the expenses incurred during that period are those treated by the 57th section: committal to prison must mean reception in prison, not the act of commitment by the magistrate. The expenses which would have been payable by a prison authority do not touch these charges, and the matter would have been plain enough except for this unfortunate proviso. I see nothing to which it can refer; but the enacting part is to my mind sufficiently clear, and my only conclusion is that the proviso must be rejected as superfluous. I think our judgment must be for the plaintiff.

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MANISTY, J.—I am of the same opinion, and I found my judgment mainly on the words “such necessary expenses as would have been payable by a prison authority.” Mr. Herschell says that the treasurer of a county is required to pay these charges as representing the county justices who are the prison authority. There are, however, two cases provided for in sect. 26 of 11 & 12 Vict. c. 42, one being in Middlesex and one in any county other than Middlesex: if it were intended that the prison authority should defray these charges in either case, it would have probably been so in both; at all events it would have been strange if the state of things were different in the two cases, and it must be so if sect. 57 is to be read as Mr. Herschell contends. I think we must reject the proviso as without effect, but that is the only difficulty in deciding as we do.

*Judgment for plaintiff.*

Solicitors for plaintiff, *Hare and Fell*, for the Treasury Solicitor.  
Solicitor for defendant, *F. F. Smallpeice*.

## COURT OF QUEEN'S BENCH.

SITTINGS AT NISI PRIUS.

*May 10 to 15, 1880.*

(Before COCKBURN, C.J.)

REG. ON THE PROSECUTION OF LAMBRI v. LABOUCHERE. (a)

*Libel—Pleading—Justification—General charge supported by specific statements—Plea proved in substance—Evidence.*  
*On the trial of an indictment for libel, the libel being that*

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

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*the prosecutor was one of a gang of card-sharpers, innuendo, that he cheated at cards, and the plea stating specific instances of card-sharping or cheating at cards, and also that he confederated with others for the purpose of playing and cheating at cards, and did so play and cheat at various places :*

*Held, that it was sufficient to prove the plea in substance, and that it was so proved, the jury finding that in two instances the plaintiff did cheat at cards, and that he did confederate with the other persons for the purpose of so playing as alleged ; and that it was not necessary to prove other instances alleged.*

*A report of the French police to the Criminal Investigation Department in London, stigmatising the prosecutor and his associates as swindlers and card-sharpers, a copy of which was read by the defendant to a friend of the prosecutor's before the libel was published, as the materials on which it was founded :*

*Held, admissible, not as proof of the facts stated, and therefore, Semble, not in proof of the justification, but under the general issue as leading up to the publication of the libel, and as evidence of bona fides, and honest belief in its truth, and so in aid of a defence under the general issue, and, semble, that there was such defence.*

*Quære, whether a foreigner, admitted to be a gambler and expelled from a foreign country on such a charge, and just arrived in this country, where he is passing himself off under a name and title to which he is not entitled, can prosecute for libel for the mere publication of the effect of such a report honestly, without malice and for the public benefit.*

*If, however, primâ facie evidence is given in proof of the justification, the onus is then on the prosecutor to disprove it, and his not calling witnesses, whom he must be in a position to call and who will be friendly to him, is strong evidence against him.*

**I**NDICTMENT for libel in a paper called *Truth*, on the 25th day of July, 1878, on the prosecutor, calling himself Demetri Lambri, the libel imputing to him that he was "one of a gang of card-sharpers."

The indictment stated that the defendant, contriving and maliciously intending to injure one Demetri Lambri, and to deprive him of his good name, fame, credit, and reputation, (a)

(a) These allegations obviously imply what on the old forms of indictment or declaration for libel was always expressly alleged, that the prosecutor (or plaintiff) was a person of good name, fame, and reputation, and enjoying a good character, of which the defendant intended to deprive him by the libel complained of, which, though it would not require express evidence to establish it, would, on the general issue, admit of evidence for the defence to disprove the good character alleged, the injury to which was the very basis of the action or prosecution, or to negative the malicious intent to injure it. Hence it was that in a prosecution for libel it was not necessary to plead a justification, and indeed, as it would admit the prosecutor's good character and the defendant's intent to injure it, it was in that sense, in a criminal prosecution, not admissible. It was sufficient to negative the essential allegations in the indictment (or declaration) that the prosecutor or plaintiff was of good character, and that the defendant intended to injure it by a false and malicious libel; and, though in a prosecution it might not be admissible to prove a malicious



and to bring him into public contempt and disgrace, and to cause it to be believed that he is a swindler and a cheat, and conspires with certain persons to win money from other persons by means of fraud, unlawful devices, and ill practices in playing at cards, and intending also to cause it to be believed that he makes his money by cheating at cards, on the 25th day of July, 1878, unlawfully and maliciously did write, print, and publish of him a false, scandalous, and malicious libel in a newspaper called *Truth*, containing divers false and malicious and defamatory matters of and concerning the said Lambri, and one Belliard, and one Guagni, according to the tenor and effect following:

“According to information which I have received Lambri—

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and injurious libel to be true, it was admissible under the general issue to show that it was not malicious, because not intended to injure, being honestly believed to be true of a man who had not the good character alleged. It was laid down, no doubt, in the Star Chamber that a libel could not be justified on an indictment (*De Libellis Famosis*, 5 Coke Rep. 254), for a justification would confess the indictment, which alleged that it was published maliciously, and with intent to injure a person who at the time of publishing the libel enjoyed a good character. It has never been held that it would not be a good defence under the general issue to disprove that, while it has long been settled that if the libel appears to be true the court will not grant an information for it (*Rex v. Bickerton*, Strange 498), which is the reason why, on an application for an information, the party always deposes to his innocence. And on the trial of an indictment which alleges a criminal offence it is conceived that the malicious intent or bad motive which are alleged are essential to be proved, and that if they are disproved, or if the prosecutor does not appear to have a good character, there is a defence on the general issue, for the ground of the prosecution is a malicious injury to a good character. It does not militate against this argument that though a libel may be justified in an action, it cannot be on an indictment (*Cropp v. Tiley*, 8 Salk. 225), for a justification confesses the malice, which may be inconsistent as to a claim for damages, but is of the essence of the criminal offence. It was long ago settled that in an action for libel or slander the defendant might under the general issue give in evidence the occasion and manner of speaking or publishing the words, i.e., to disprove the alleged injury or intent to injure, and show an excuse for the utterance or publication disproving malice (*Smith v. Richardson*, Willes, 20); and though the defendant could not, on the general issue, give evidence of the truth of the charge in the libel where it amounted to treason or felony (because they were capital crimes, and the finding of a jury amounted to a presentment on which the party might at once be indicted) that rather implies that in other cases the justification might be proved; and even if not, it is to be observed that a justification on the ground merely of the truth admitted the malicious intent to injure a person of good character, and that, though it might not affect a plea as a bar to a claim for damages, might consistently be held not to bar an indictment for a malicious injury. And it is conceived that, on the other hand, it was open to the defendant under the general issue to disprove a malicious injury by disproving the malice or the injury. The declaration or indictment in the old form in libel stated that the plaintiff or prosecutor was a person of good character, and especially in the particular matter or avocation in respect of which the libel was complained of, and that the defendant, intending to injure him in that character, falsely and maliciously published the alleged libel; and all this, under the general issue, could be controverted. Thus, in an action by a stock-jobber for libel on him in that character, he had to allege that he dealt lawfully and entered into lawful contracts, and conducted himself with integrity, &c.; and his declaration was bad on general demurrer, if it did not state that the business he carried on was lawful: (*Morris v. Langdale*, 2 Bos. & P. 289.) So in any case in which it might be under some circumstances unlawful. Where the libel was of a plaintiff in his trade, it could be shown under the general issue that it was not lawful (*Manning v. Clement*, 7 B. & C. 862); for a person who carries on an illegal avocation cannot maintain an action for a libel regarding his conduct in such avocation: (*Hunt v. Bell*, 7 Bing. 1.) On the same principle, it was open to the defendant, under the general issue, to show that there were at the time of the libel numerous reports to the effect of what was imputed, because this showed that in fact the plaintiff had not the character represented, and



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meaning the said Demetri Lambri—a Frenchman named Belliard and Guagni, an Italian, are a gang who live by "card-sharping," meaning thereby that the said Demetri Lambri is a swindler and a cheat, and that in fact the said Lambri lives by cheating or playing at cards, and that he and the said Belliard and Guagni had, previous to the libel, conspired together in cheating divers persons in playing at cards to the great damage and disgrace of the said Demetri Lambri.

Second count setting forth the words without the innuendo as to the alleged meaning.

Plea (1) Not guilty of the said premises charged upon the

which it was supposed had been injured. It was held, indeed, that evidence that the libel was merely a repetition of common rumours which were prevalent at the time of the publication, and on which the libel was founded, was inadmissible (*Waitman v. Weaver*, 11 Price, 257; *Jones v. Stevens*, *ib.* 285); but there the evidence offered was only of suspicions of specific facts, and was not deemed to show that in fact the plaintiff's character was affected by them; and in other cases where such evidence has been rejected, it was not directed to reports current and affecting the plaintiff's character at the time of the libel. In one case it was held by Cresswell, J., that where the defendant at the time of uttering the words referred to certain reports current against the plaintiff, which he stated he had reason to believe were true, he could, upon the general issue, prove that such reports had in fact prevailed in the plaintiff's neighbourhood, and were the common topic of conversation before the words were uttered by the defendant: (*Richards v. Richards*, 2 M. & R. 557.) In a subsequent case, in which that ruling was cited and not disapproved of, evidence to show that the plaintiff was believed to be addicted to the evil practices imputed, was held inadmissible, only because the evidence was not confined to the time prior to the libel, but might have been understood as applying to rumours after the libel, and possibly originated by the libel itself: (*Thompson v. Nye*, 16 Q. B. Rep. 176.) The general question, it is true, was thereby open; but, as there had been a ruling of an eminent judge in favour of the rule here submitted, and after argument none of the judges dissented from it, and on the contrary carefully distinguished the case, it is conceived that, to say the least, that view may fairly be maintained. It is true that the evidence, where it has been admitted, has been admitted as going to the damages; but that is sufficient, for it might be carried to the effect of showing that there was, and could be, no injury to the character, so that there could be no injury to it for which damages could be recovered, and no malicious injury to it for which an indictment could be sustained. These cases were cited and recognised in one more recent in this court, in which Lord Denman, C.J., in the judgment, appears to have admitted that on the general issue in an action it would be an answer to show that the plaintiff "was a person who had no right to sue in a court of justice for an injury to his character" (by reason of his being engaged in horse racing); but the court held that in the particular case "the objection was groundless" (because horse racing was not in itself illegal), and even if it were, it would only, apart from fraud, be a mere breach of positive law in a particular matter, which would not deprive a person of all protection to his character in matters connected with the transaction (*Greville v. Chapman*, 5 Q. B. 745), for he might be, as in that case he was, a person of the highest character. But in another case it appears to have been admitted that a person could not sue for an injury to a business he could not legally carry on without some legalisation, as e.g. a licence, which was not alleged (*Bignell v. Buzzard*, 8 H. & N. 217), though that would not prevent him from suing for an injury to property or character, assuming either to exist; and good character, of course, would be presumed until the contrary appeared. The general issue at common law puts in issue the whole substance of the charge, either on a declaration or an indictment. The "new rules" of pleading, based as they were on a desire to split it up into distinct issues, tended to obscure this in actions; but even in actions it still admitted evidence to disprove the malice, for it was held that it admitted the defence of a privileged communication, as it is called—an incorrect expression, the true nature of the defence being simply to negative the malice, which is the essence of the action. Thus, Lord Denman, in giving judgment to that effect, said: "In the instance of an action of slander, mentioned in the Rules, it is said that the plea of not guilty will operate as before in denial of the words having been spoken maliciously; and therefore the defence of a privileged communication, as it goes to the very root of

defendant (a) ; (2) For a second plea pursuant to the statute (b), that the said alleged libels are and each of them is true in substance and in fact, in this, that before the publishing of the libels the said Demetri Lambri did, in the month of April, 1877, come to London for the purpose of gaining a livelihood by gambling and cheating at cards, and did accordingly play and cheat at cards at divers places there, and especially procured an introduction to two persons named De Sterke, residing at 39, Burton-crescent, and visited them at their house, and there on the 23rd day of April, 1877, played at cards, and by cheating thereat won of one Bertha the sum of 27*l.*, and of the other, Laura, the sum of 40*l.*, which sums were then by those persons paid to him ; and also upon two days in April, 1877, to wit, on the 20th and 21st days of April, went with a confederate whose name is to the defendant unknown, to a house No. 8, St. James-place, Aldgate, in the City of London, and there on such days played at cards with one Mr. Gober and other persons whose names are to the defendant unknown, and by cheating thereat did, with the assistance of such confederate, win, and did thereby obtain, the sum of 70*l.*, and the defendant further says that before the publishing of the libel the said Lambri did, to wit, in 1877, unlawfully confederate and agree and conspire with Belliard, Guagni, and others to the defendant unknown, that they, the said confederates and conspirators, should act in concert as gamblers and cheats for the purpose of assisting one another in playing at cards and otherwise gambling, and in

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the complaint, need not be pleaded :” (*Lillis v. Price*, 5 A. & E. 645.) It goes to the very root of the complaint because it is necessary to negative malice : (*Porter v. Weston*, 5 Bing. N. C. 710.) If in such actions it is necessary specially to traverse the allegation made by way of inducement, that is only by virtue of the statutory rules, and at common law it would not have been necessary, and it would have been in issue under not guilty ; and trials on indictment are still as they were at common law, except so far as Lord Campbell’s Act extends the right of the defendant by enabling him, without disproving the prosecutor’s character or negativing malice, to plead a justification on the ground of the truth of the charges made, and the public interest in their disclosure. But it is conceived that it is open to the defendant, under the general issue, especially on an indictment, to negative the good character and the malicious injury, and thus destroy the very basis of the action or the prosecution ; for the object of a prosecution is to protect a person of good character and reputation, just as the object of an action is to compensate him for an injury to it. And it is one thing to disprove the possession of the good name and fame and reputation alleged by the prosecutor, and quite another thing to prove precisely particular allegations of immorality or dishonesty. This was strongly illustrated in the present case, which affords a remarkable illustration of the practical operation of the law of libel as it is now understood and administered. For enough was admitted by the prosecutor, or proved without difficulty, to show that the libel could not have injured, or have been intended to injure, any “good name or reputation” he had acquired or was entitled to in this country, where he, a foreigner admitted to have been expelled from two countries, and with reports of the police against him, had (according to his own account) only just arrived at the time of the alleged libel ; but the proof of the matters alleged in the plea of justification was extremely difficult, and indeed, on the trial of the prosecution against the printer, the necessary proof could not be furnished, and he was actually convicted and fined. It was only by accident that the evidence was discovered in this case, and, as the libel was general, it was held to be sufficient to prove it in substance. But it is conceived there was an ample defence under the general issue.

(a) *Vide ante*. There was a defence on the general issue, but it was not thought safe to rely on that alone.

(b) Lord Campbell’s Libel Act, 6 & 7 Vict. c. 96.

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procuring persons of wealth and ignorant of their true character and history, and supposing them to be gentlemen of position and respectability, who played for amusement only, to game with some members of the confederacy for their mutual profit and advantage; and that the said confederates, by means of false and fraudulent representations as to position and character, and by assuming from time to time divers different characters, and by falsely pretending that they were persons of respectability and social standing, by their mutual aid and co-operation should procure themselves to be received into the society of persons of wealth who would be likely to game with and to lose money to them if they should be admitted into such society, and by the like means gain admission into clubs and other places where such persons would be found, and by falsely pretending that they played for amusement and independently of one another might induce such persons to game and play with them for money, and thereby be enabled to win money from such persons and cheat and defraud them. And that the said Lambri, Belliard, and Guagni did in pursuance of such conspiracy severally leave France in February 1878, and come to London; and that Lambri did, in pursuance of such conspiracy, falsely assume and procure himself to be called and known by the title of Pasha, and did falsely pretend to be a person of wealth and respectability and good social standing, and did thereby, and with the aid and co-operation of the other conspirators, procure himself to be received and entertained as a guest at the house of Sir John Sebright, Bart., to wit, in April, May, and June, 1878; and the said Guagni did in pursuance of the conspiracy falsely pretend that he was attached to the Italian Legation in Paris; and that Lambri, Belliard, and Guagni did by means of such false representations procure themselves to be admitted as members of or visitors to London clubs, to wit, the London and County Club and the Cavendish; and in pursuance of such conspiracy, and with the knowledge and connivance and by the aid and co-operation of Belliard and Guagni, the said D. Lambri did at the said houses and clubs falsely assume the dignity and title of Pasha, and did on divers occasions in April, May, and June, 1878, at the said clubs induce divers persons, members of such clubs, whose names are to the defendant unknown, to play with them at baccarat and other games of cards, and by cheating and fraudulent devices did win from such members large sums of money; and so, as herein appears, the said libel is true in substance and fact. And further, the defendant says, pursuant to the statute, that before the publishing of the libels there had been established in London, to the common injury and against good morals, divers proprietary clubs for the purpose of gaming for reward to the proprietors, into which clubs admission was obtained by large fees paid to the proprietors for the privilege of gaming there, and into which young and inexperienced persons were induced to go, and were entrapped by designing persons for the purpose

of inducing them to play upon unequal terms with the gamblers and designing persons frequenting clubs, and beyond their means, and so as to injure themselves, and thereby many such persons had been much injured, and such clubs were in truth and in fact illegal gaming houses; and the defendant for the public good had endeavoured to procure their suppression, and that for this purpose he wrote and published certain articles concerning them, and the alleged libels were published in pursuance of such lawful endeavours, and as a part of a series of articles published for that purpose. And the defendant says that for these reasons it was for the public benefit that the alleged libels should be published, because it was right and proper that persons should not be imposed upon by the false assumption of title on the part of Lambri, and should not be allowed to form an erroneous notion of his character and position, but should be informed of his real character and position, and of his being an adept at cards, and a gambler (a), and that he should not be allowed to introduce himself into society under that falsely assumed title as a gentleman playing for his amusement, and that the public should be protected from the acts and devices of the said confederates.

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On this plea an issue was joined.

Sir H. Giffard, Littler, and Moloney, for the prosecution.

O. Russell, W. G. Harrison, and F. H. Lewis, for the defendant.

It appeared in the *acte de naissance* of the prosecutor that he was a foreigner, born in Mitylene, in Greece, and that his original name was "Lambou Kallias." He himself swore that he was never in this country until May, 1878, the alleged libel being in July, 1878. It appeared clearly on his own evidence (as stated by Cockburn, C.J.) that he was a regular gambler, and it was stated by his counsel in opening the case that he had been expelled from Belgium and France; and though he stated that the order of expulsion had been reversed in one country, and that an application for the reversal of a similar order in the other was under consideration, the latter part of the statement was contradicted by a witness (from the French police), and there was no evidence but the prosecutor's statement as to the other. (b)

It appeared further that in June, 1878, the defendant met the prosecutor in society (in the house of Sir J. Sebright, mentioned in the plea) and found him passing as "Lambri Pasha." This was proved beyond a doubt by a respectable gentleman, who also met him there, and swore that he was so addressed by Lady Sebright, and by himself as "Pasha" and *Votre Excellence*, and

(a) After demurrer.

(b) Under these circumstances how could it be maintained that (as alleged in the indictment) the libel was published to injure and deprive him of his good name, fame, and reputation, i.e., in this country, where it was published—seeing that he could not be said to have acquired any in this country, and certainly appeared to have none abroad? But this point, though it arose on the general issue (*vide ante*, note a, p. 420), was not taken, reliance being placed on the justification.

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the prosecutor himself stated that there was high play there, though this was not witnessed by the gentleman referred to. It further appeared that Billiard and Guagni came over to London, and were at the same hotel as that at which the prosecutor stayed, and that at an hotel at which the prosecutor stayed his name was put up as "Lambri Pasha." And further that he had got admission to the clubs mentioned, and there won large sums—as much as 700*l.* and 1500*l.* at a time; and though there was no express evidence of foul play on his part, it appeared on his own evidence that in more than one instance payment was refused; and though in one instance in which he admitted the cheque was stopped he said it was for want of assets there was no other evidence of it; and in one instance he admitted the letters being produced which proved that the loser had refused to pay unless the prosecutor cleared himself from certain charges made against him.

It was admitted that he never was a "Pasha," and the only explanation given was that he had been private secretary to the secretary of Midhat Pasha, of which, however, there was no evidence but his own statement.

It appeared that in June, 1878, in consequence of some inquiries made about these persons in Scotland-yard, the head of the Criminal Detective Department there had communicated with the Préfet of Police in Paris, and had received a report from him, of which the defendant had obtained a copy, and he had inserted in a paper called *Truth*, of which he was proprietor and editor, a statement as to these persons, and especially as to "Lambri," to the effect that this was not his real name, and that he was not a Pasha, but an impostor and a regular gambler, and passing himself off as a Pasha for the purpose of obtaining access to clubs and private society, and thus enabling him to pursue his gambling, to his own profit and the prejudice of others.

A friend of the prosecutor's thereupon saw the defendant, and offered him a letter signed by the prosecutor for insertion in the paper. The defendant accepted it for publication and published it, but told the prosecutor's friend that, upon information which he had received—meaning the report of the French police, which he produced and read to him—he should also publish a counter-statement, which on the 25th July he accordingly did, and that was the libel complained of: to the effect that the prosecutor and his associates were a gang of card sharpers. (a)

Sir *H. Giffard*, in opening the case for the prosecution, said he should not call the prosecutor until he saw what case was made by the evidence in support of the justification, though he certainly should call him to contradict it if any case was made. This course, he said, had been approved of by Lord Campbell, C.J. in the case of *Reg. v. Newman* (b), when Achilli, the prosecutor,

(a) The publisher had been prosecuted and convicted, there being no evidence to prove the justification, and the defence under the general issue not being insisted on.

(b) 1 El. & Bl. 558, also reported in a separate form by the present reporter.



was called in contradiction of the evidence on the plea of justification. (a)

Accordingly the case for the prosecution consisted of proof of the publication of the libel, of which it was admitted that Mr. Labouchere was the author.

*O. Russell* then opened the case for the defence, and evidence was given in support of the plea of justification.

In support of the statement at the commencement of the libel—"According to information I have received," Lambri, Belliard, and Guagni are a gang who live by card-sharping—proof was offered of a report from the Prefect of Police in Paris to the head of the Criminal Investigation Department in Scotland-yard relating to those persons.

Mr. Howard Vincent, head of the Criminal Investigation Department, was called, and stated that in July, 1878, in consequence of an inquiry he had addressed to the Prefect of Police in Paris, he had received a report, which he produced; but declined to give up until directed so to do, as he said that such documents were considered secret, and never disclosed.

COCKBURN, C.J., desired to look at it, and it was handed to him in this form:

Enqre: LAMBRI, BELLARD, and GUAGNI.

Prefecture of Police,  
Paris, July 9th, 1878.

(Translation.)

SIR,—In your letter of the 15th ult. you asked me to forward to you any information I could respecting Lambri, Belliard, and Guagni, in London at the present time.

Lambri is none other than Lambrinides, aged about forty, born in Roumania, whose father is a banker at Odessa.

Taking by turns the names of Lambertini, Lambrini, Lambrinides, Fazhil, and Lambri, he assiduously frequents gaming houses and the casinos of mineral watering places.

Belliard St. Sauveur (Jules Edward), aged thirty-seven, was born at Valenciennes, and has lived for several years in Paris (No. 62, Rue de l'Arcade).

He is a former waiter in the neighbourhood of Marseilles, and is described as a very clever Greek. He visits watering places in company with Lambrinides and De Guagni de Marconald (Fabio). This last, who is of London origin, is thirty-nine years of age, and has lived for the last three years at No. 8, Avenue Percier. He has never been attached, as he alleges, to the Italian Legation, and is not known at the Consulate-General of Italy in Paris.

This individual sometimes calls himself a person with private means, and sometimes a merchant, but in reality he has no profession, and appears only to live, as well as the others above mentioned, by swindling at play, &c.

Signed for the PREFECT OF POLICE.

To the Director of the Department of Criminal Investigation.

COCKBURN, C.J. said the document would not of itself be admissible in evidence, as it was a mere statement by one person

(a) But that was on the trial of a criminal information, in the application for which the prosecutor had already denied the truth of the charges in the libel, which, it may be added, extended over his whole life. And yet certainly it has always been usual, even on the trial of a criminal information, and before Lord Campbell's Act, when the truth could not be put in issue at the trial, to call the prosecutor in the first instance, the proceeding being for the vindication of character. That course was taken, for example, on the trial of Phillips on a criminal information for a libel on the Duke of Cumberland, before Lord Denman, C.J., Court of Queen's Bench, June, 1883, when the Duke was called.

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to another, and would not be evidence on the issue as to the truth of the facts it set forth. Upon this,

*Russell*, who had said in his address to the jury that a copy of it had been read to a person sent by the prosecutor with a letter to the defendant (in answer to a prior publication), which was inserted in the paper, and of which the libel was a comment, offered to prove this, and proposed to put the copy in as evidence of statements made to the prosecutor or his agent in the matter, just before the publication of the alleged libel.

COCKBURN, C.J., said that he thought on that ground the copy thus read would be admissible, as leading up to the publication of the libel, and as part of a conversation with the prosecutor's friend, who, however, was not an agent to make admissions on his part as to its truth.

The witness stated that the copy produced was on official paper, and appeared to have borne the official stamp at the top, but which had been torn off; and that it was in the handwriting of some clerk in the office, and he had no doubt of its authenticity, though he had not authorised it to be given out, and that it was irregular to give out copies of such documents.

A witness was called who proved that after the 11th day of July, when the first paragraph as to the prosecutor appeared in the paper, a friend of the prosecutor called at the office with a letter signed by the prosecutor for insertion in the paper, and saw Mr. Labouchere in the presence of the witness, and Mr. Labouchere read to him the document now produced as the authority on which he had made his statements. The prosecutor's letter was inserted in the paper on the 25th day of July, and along with the alleged libel, which had reference to it. The document was put in.

A witness was called who stated that in 1863 he knew Lambri, the prosecutor, at Cairo, as a *garçon de la roulette* at a gambling house there, where roulette was played, and that Lambri was employed by the proprietor to open the play at the roulette table, for which he would be paid a few francs a day. Witness saw him, he said, often, at the roulette tables there, and in 1876 he saw him in Paris, where he went by the name of Lambrinides, and appeared to be in poor circumstances, running up a debt of 180 francs for refreshments, part of which he left unpaid. And this was confirmed by a clothes dealer from Paris, who stated that in November and December, 1876, the prosecutor sold him some articles of dress, and pawn-tickets for similar articles; and both these witnesses identified the prosecutor.

Another witness, an Englishman (who admitted that he had been convicted of forgery), stated that early in 1877 he met the prosecutor in Paris with a person named De Metrovich, with whom the prosecutor was lodging, and that the prosecutor—who appeared, he said, to be in bad circumstances, and to be doing nothing except going with De Metrovich to gambling houses—asked the witness what games were played in London, and, being

told *faro*, said that he and De Metrovich were the best players in Europe at *faro*, and showed him a trick by which they played. The witness further stated that it was arranged between them that he should take them to London, and introduce them to any gambling clubs or houses where they could play, and that he, paying their expenses, should share their winnings; that he accordingly, on the 16th day of April, 1877, brought them to London, and took them that night to an hotel in the Euston-road, where they lodged for two days; that he took them the two next nights to a gambling house in the City, where they played with a man, from whom they won money; and that he then took them to the house of two women he knew in Burton-crescent—Bertha and Laura De Sterke—where also they played and won money, and that the De Sterkes believed it was won unfairly, and violently accused them of cheating. The lodging-house keeper was called to confirm this, and identified Lambri in Court. The man with whom Lambri and De Metrovich were said to have played at the house in the City was called, and confirmed the story, stating that he suspected their play, and, in order to defeat it, on the second evening altered the mode of arranging the cards, on which they gave up play and left. The De Sterkes were also called, and gave evidence in confirmation, stating that they believed they were cheated, and violently accused the men of it at the time.

A witness who had been introduced to Lambri in 1878 stated that he had introduced him to the London and County Club, and had seen him play there, and had also seen him at the Cavendish Club, and had seen Guagni there. This witness, who was friendly to Lambri, also admitted that he was sometimes called “Pasha” at the clubs, but only, he said, as fun and as a nickname.

A gentleman who had been secretary of another club, however, where Lambri had got admitted, said that he was always addressed as “Lambri Pasha,” and not at all in fun or by way of nickname. In the club book, indeed, he was entered “Monsieur Lambri,” but he never, the witness said, disclaimed being a Pasha. And another gentleman, who had met Lambri at Sir John Sebright’s, stated that he was addressed there as Pasha and *Votre Excellence*, and he never repudiated the title.

Finally, it was proved that Lambri had been expelled from France, and it was also stated that he had been expelled from Belgium.

In answer to the case thus made,

The prosecutor was called, and gave a history of himself, denying that he was ever in Cairo, describing himself as having made a fortune partly in Persia and partly in Roumania, where he said he made the acquaintance of Midhat Pasha, and as having come to Paris in 1876 with this fortune, part of which he said he deposited with a friend, a secretary of Midhat’s, and part he deposited at an hotel; and in 1877 he said that he placed the

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greater part of it in several banks, in confirmation of which he produced bank receipts for 3000*l.*, dated, however, in Oct. 1877, and giving no confirmatory evidence as to his circumstances in 1876. He denied altogether the statements as to his having been in poverty in 1876, and as to the incidents alleged to have occurred then; and he denied the alleged visit to London in April, 1877, declaring that he was never in London until March, 1878, when he came, he said, with secretaries of Midhat Pasha. He denied that he had ever represented himself as Pasha, and explained that his being sometimes called so had arisen from his having associated with Midhat Pasha and being secretary to Ismael Pasha, Midhat's secretary. He admitted having been a good deal associated with Belliard and Guagni, and having been with them to various places on the Continent, where they played; and he admitted that they came over to England about the time he came over in 1878, and stayed at the same hotel. He admitted playing at clubs and houses for large sums, but he said losing as well as winning, though he admitted that he won such sums as 300*l.*, 700*l.*, and 1500*l.* He admitted that in one instance a cheque given him for 1500*l.* was not paid, but he said it was refused for want of assets. He admitted that in another case he had won a large sum from a gentleman, who refused to pay it until he had given proof of the falsehood of the charges made against him, and that he had not yet given such proof; but he denied ever playing unfairly, and, except the instances spoken to by the witnesses for the defence, there was no express proof of it. He admitted a telegram to him from Belliard, "Useless to go to Cairo; come to Italy as arranged, or come back to arrange other affairs," and he said these affairs were affairs of pleasure. He admitted having written to some one else who played, "He has telegraphed to me to go to Spa." He admitted being at Spa, Baden, and other well-known gambling resorts. He admitted playing in London with Belliard, and also with Guagni; but he said he lost rather than won, and lost 1000*l.* at one of the private houses referred to, and he negatived the charges in the plea.

COCKBURN, C.J., in summing up the case to the jury said: The law as applicable to the case is clear; there can be no doubt there is a libel; and the question on the special plea is twofold: first, are the matters stated in it sufficiently proved? and next, was it for the public interest that they should be made known?

The substance of the libel is that the prosecutor was one of a gang of card-sharpers, and engaged with others in cheating at cards—in effect, that he is a professional gambler who resorts to foul practices in order to cheat at cards.

As to the first question with reference to the first part of the plea, the specific acts of cheating alleged to have taken place in April, 1877, the evidence of the principal witness is tainted, but it is confirmed, and the question for you is, whether on the whole of the evidence the charges are proved.

If you do not believe those charges, then certainly the case for the defence would be extremely weak. For the libel does not relate to the transactions alleged to have occurred in 1877 ; for it is admitted that in 1878, when the libel was published, these matters were not known to the defendant. The libel relates to card-sharping in 1878, as the prosecutor's practice at this time, and the defendant justifies the libel by alleging that in 1878, the prosecutor, with the two persons referred to—Belliard and Guagni—came to this country for the purpose of playing as card-sharpers, and practising foul arts at play. And there is certainly no express evidence of this ; there is no evidence beyond the fact of their being habitual gamblers ; there is no evidence of their actually resorting to foul practices at play.

Upon this question I must warn you that the report of the French police—a copy of which has been admitted in evidence merely as having been read by the defendant to a person sent by the prosecutor—though it may be material in one point of view in favour of the defendant, as showing that he wrote the libel upon information he had received (*a*), is yet not evidence of the truth of the facts it sets forth, being upon statements received from unknown and perhaps unreliable sources.

But if you think that the former charges are proved, and that the prosecutor and his confederate did play tricks at play in 1877, and did thereby win money from the persons referred to—then you may reasonably infer that he would play in the same way at other times and places. It is all-important, therefore, that you should be satisfied as to the truth of those earlier charges, because the defendant has to prove that the prosecutor in 1878 was engaged with others in card-sharping and cheating at cards ; and there is no actual evidence of their so playing in that year, though there is evidence of circumstances of suspicion, as their coming over here in that year about the same time and being here together, and their being at gaming clubs here, and their having been at gambling places on the Continent together, and the suspicious telegrams as to going to Spa and arranging their affairs. There is evidence also of their playing at clubs in London, though there is no positive proof that they played unfairly. There is evidence of a cheque not having been paid, though the prosecutor said it was want of assets ; and there is evidence that in another instance the gentleman who lost refused to pay until the prosecutor had shown the charges against him to be false ; but there is no positive evidence of cheating at cards. It is clear that these persons were gamblers ; it is not concealed that the prosecutor Lambri is an habitual gambler, and the affairs alluded to may be affairs of gambling, but the gambling might not have been unfair—of that you must judge from all the circumstances—and there is this observation to be made, that these persons, De Metrovich, Belliard, and Guagni, the prosecutor's friends and associates, have none of them been called on

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(*a*) As alleged in the libel itself.

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his part, though, if they and he are innocent, their evidence would have been most material in his favour. No doubt it is for the defendant to make out his justification; but when a *prima facie* case has been made out, and the prosecutor undertakes to answer it and admits that it calls for an answer, it is for him to make his answer as complete and satisfactory as he can, and to produce any evidence it is in his power to give in order to support it. Nor must it be forgotten that the object of such a prosecution for libel is professedly to vindicate the prosecutor's character, and it is not therefore a question as to technical rules of proof or pleading, or as to legal obligation to give certain evidence; but it is for the person who thus undertakes to vindicate his character to adduce any evidence it is in his power to offer in order to rebut the imputations against him; and you may therefore fairly ask yourselves whether, if these persons had not been associated with the prosecutor in the evil practices alleged, he would not have been eager to produce them as witnesses to rebut the charges made against him. But they have not been called, nor has there been any explanation of their absence. On the whole case, therefore, it is for you to consider whether or not the defendant has made out the truth of the matters alleged in the libel and justified in the plea, which is the first thing he has to establish.

Then, in the next place, you must be satisfied that it was for the public interest that these matters—assuming them to be true—should be published. As to this there may be some who think that persons who gamble may be left to take care of themselves, and that courts of justice may be better occupied than in trying such cases. But, on the other hand, persons of undoubted honour do play, and it may be that, as between those who play fairly and those who play foully, it is for the public interest that those who play foully and cheat at cards should be denounced and made known, that honourable men may not be victimised by such dishonest practices. That, however, is for you to consider. The defendant has to satisfy you of this as well as of the truth of the libel—that it was true in fact, and that it was for the public interest that it should be published.

In substance you have to consider whether it is proved that the prosecutor was an habitual card-sharper. If the defendant has failed to prove that, then the prosecutor is entitled to the verdict; if he has satisfied you of it, then it is your duty to give your verdict for the defendant.

*Littler* submitted that the jury ought to be directed to find on each charge specifically, as in *Reg. v. Newman* (a), as the plea required to be proved *in omnibus*, and, if not proved entirely, it failed altogether; but as to this,

COCKBURN, C.J., thought otherwise; that it was sufficient if the plea was proved in substance. In the case cited, he said, the libel contained a number of specific charges, all of which required to be proved; but here it was different, for the

(a) *Vide ante*, p. 426 (1 E. & B. 558.)



libel was general, and it was sufficient to prove so much of the plea as would justify the libel. The libel charged that the prosecutor Lambri was one of a gang of card-sharpers, and the substance of the plea of justification was that he had, with a confederate, acted as a card-sharper on two occasions, and had conspired or confederated with the two persons named to act as card-sharpers; so that the question for the jury in substance was whether those instances of card-sharping were proved, and whether the conspiracy or combination alleged was also proved. And he put to the jury these questions—

1. Did Lambri, with a confederate, play falsely at the City gambling house, and in that way win money from Gober there?

2. Did he in like manner play at the house in Burton-crescent and win money from the De Stérkes?

3. Did he enter into a confederacy with Belliard and Guagni to come to this country in order to play and win money in that way?

4. Did he assume the rank of a Pasha in order to obtain access to clubs and private houses with a view to his so playing, and winning money at play by means of such practices?

The jury found all these questions in the affirmative.

COCKBURN, C.J., thereupon held that these findings were sufficient to support a verdict for the defendant on the plea of justification. He was asked to leave it to the jury further, whether Lambri also played falsely at the clubs mentioned, and he did accordingly put that to the jury (though he said he thought it unnecessary to do so); but they said there was not evidence to enable them to answer that question one way or the other, and so no finding was taken on that; and the Lord Chief Justice, holding, as he said, that it was, after the other findings immaterial, and that the other findings were sufficient to support a verdict for the defendant on the plea of justification, directed the verdict to be entered for him on that plea; and it was so entered accordingly.

*Verdict for the defendant on the plea of justification (a).*

(a) And for the prosecutor on the issue on the plea of not guilty, so that on the record there would appear these findings: (1) that the defendant, maliciously intending to injure the prosecutor, and deprive him of the good name, fame, and character which he enjoyed, falsely and maliciously published of him a false and malicious libel; and (2) that the alleged libel was true in this, that the prosecutor had no such character or name, but that he passed himself off by a name and title to which he had no right, and for the purpose of gambling, &c.; and that the defendant published this not falsely, but truly; and not maliciously, but, on the contrary, with an honest and laudable intent to benefit the public.

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### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

*May 14, 1880.*

(Before MAY, C.J., O'BRIEN, J., FITZGERALD, J. and BARRY, J.)

REG. v. SAMUEL KING. (a)

*Certiorari—Use of threatening, abusive, or insulting language, or behaviour with intent to provoke a breach of the peace.*

*Where a tract distributor followed two Roman Catholic clergymen in the public street, and handed them a bill, inviting them to a discussion on religious matters, and persisted in holding up the bill to them after he had been informed that they were Roman Catholic priests ; it was held that such conduct was making use of threatening, abusive, or insulting language or behaviour which might provoke a breach of the peace.*

*And a magistrate having convicted the tract distributor for such conduct on a charge of assault, this court refused a certiorari to bring up the conviction for the purpose of quashing it.*

**M**OTION on behalf of Samuel King for a writ of *certiorari* to move into court and quash the conviction whereby he had been sentenced to a fine of 20s. or fourteen days imprisonment, by Mr. Woodlock, the Divisional Police Magistrate, on a charge of having assaulted the Rev. Mr. Brennan by obstructing him in the public streets in offering a handbill.

The facts of the case, as set forth in the affidavit of the defendant Mr. Samuel King, were as follows :—

While engaged in distributing handbills announcing a meeting in the Mission Buildings, Townsend-street, for the purpose of a friendly discussion on religious matters, he met two Roman Catholic priests in Brunswick-street coming from the opposite direction towards him, and whilst passing them, without meaning any offence, but wishing to hand them one of the handbills, just as he had been doing to others, he politely asked one of the gentlemen (the Rev. Mr. Brennan) to accept of the bill, at the

(a) Reported by CECIL R. ROCHE, Esq., Barrister-at-Law.

same time inviting him to the meeting in these words, "Will you come to our meeting to-night in Townsend-street?" The Rev. Mr. Brennan thereupon turned towards him, and said, "What is this?" at the same time reading the heading of the bill, "A friendly discussion for Roman Catholic priests and laymen." Then, by way of detaining deponent as he was passing on, the rev. gentleman beckoned to him, and said, "Come here," and, turning to his companion, he said, "Witness how he has insulted me in the street." The deponent then continued his way distributing bills, whilst the Rev. Mr. Brennan crossed to the opposite side of the street, and turned back, following the deponent in the same direction, and watching him. A policeman having been brought, the Rev. Mr. Brennan charged the deponent with an assault. Before the policeman took the deponent in charge, the deponent put the question to the reverend Mr. Brennan, "Did I touch you?" He replied, "No, but I interpret what you did as an assault." The deponent was then taken in charge and brought before the magistrate, and was charged with having assaulted the Rev. Mr. Brennan by obstructing him in the public street in offering him a handbill. The Rev. Mr. Brennan stated before the magistrate that the deponent had assaulted him by obstructing his way in the street in persisting to offer him a bill. The magistrate having asked 'had deponent any question to put to the Rev. Mr. Brennan,' deponent asked the reverend gentleman, "Did I touch you?" He replied, "No." Deponent then asked, "Could you have gone on if you liked?" He said, "Well, I could." Deponent also asked him, "Did I present the bill to you more than once," and he said, "No, but you kept it up for two minutes." The magistrate asked, "Did deponent not know they were Roman Catholic priests," and deponent replied, "I did, but thought it no harm to offer a bill." The magistrate then immediately said, "I fine you 20s. or fourteen days' imprisonment. The fine was paid. The deponent denied that he meant any insult to the Rev. Mr. Brennan.

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*Walter Boyd*, Q.C., for the defendant King, moved for a conditional order for a *certiorari* to quash the conviction.

MAY, C.J.—The application to us is for a *certiorari*, and the rule of the court being that that should only go, when the act sought to be reviewed or quashed was in excess of jurisdiction, and not on any mere point of form, let us see what the case is. Whether the complaint made by the reverend gentleman would amount to a charge of a criminal nature is not altogether the question, but rather whether the case comes within the Act of Parliament for improving the Dublin police (5 & 6 Vict. c. 24, s. 14, sub-s. 13) which says: "Every person who shall use any threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned"—for it was under that section that the magistrate proceeded. The information made by this gentleman was that he was going along

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Brunswick-street with another priest; that the defendant stopped him, handed him a bill inviting him to a friendly discussion in Townsend-street, and that he persisted in forcing the bill upon him, holding it up to his face for two minutes. Now, I am clearly of opinion that this man distributing these tracts, and seeing two gentlemen coming down the street, who from their dress he must have known to be Roman Catholic priests, if he stopped them and put this placard into their hands or exhibited it, or flaunted it before them, and persisted even after he was told, as the complainant deposed to here, that they were Roman Catholic priests, in following them and repeating the invitation, that he did it, not with the intention of inducing them to attend any such meeting, but rather with the intention of offending or insulting them. He cannot but know the state of feeling that prevails in matters of the kind in this country, and my impression is that the act he did might tend to provoke a breach of the peace; and if the magistrate before whom the case was brought took that view, we cannot say that his decision was illegal or in excess of jurisdiction. We will say no rule on the motion.

The other judges concurred.

*Rule refused.*

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## COURT OF APPEAL AT WESTMINSTER.

TRINITY SITTINGS, 1880.

*June 24 and 25.*

(Before JAMES, L.J., BRAMWELL, L.J., and BRETT, L.J.)

REG. v. ORTON, *alias* CASTRO, &c. (a)

*Counts for different misdemeanours, on which the judgment is of the same nature, may be joined in the same indictment, and on such counts judgment may, and indeed ought to be, separately entered; and on such counts there may be consecutive sentences of imprisonment or penal servitude, even though each be the maximum sentence for a single offence.*

*On an indictment for perjury at common law, different counts may be laid upon assignments of perjury on oaths taken on different occasions, and in different suits or proceedings, although*

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

*all the assignments of perjury, on each oath and occasion ought, it should seem, to be included in the same count ; and on each of such counts the defendant, if convicted thereon, may be separately sentenced.*

*And on an indictment at common law for perjury, laid in two counts, one charging perjury in an action, and the other in an affidavit in a suit in Chancery in aid of the action, the jury finding the defendant guilty on both :*

*Held, that under the statutes 2 Geo. 2, c. 25, s. 2, and 20 & 21 Vict. c. 3, s. 2, he might be sentenced upon each count to seven years penal servitude, the sentence on the second to commence upon the expiration of the sentence on the first count.*

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**E**RROR, on a judgment in the Queen's Bench for perjury, on an indictment in the Central Criminal Court, removed into the Queen's Bench by *certiorari*. The record set forth the indictment, which was in two counts, and ran thus: That the jurors for our Lady the Queen upon their oath present that heretofore, and on the 10th day of May, 1871, at Westminster, and before the Right Honourable Sir William Bovill, Knight, Her Majesty's Chief Justice, &c., a certain issue duly joined in an action of ejectment between Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, as the claimant in the said action, but who in the said action sued by the name and description of Sir Roger Charles Doughty Tichborne, Baronet, and Franklyn Lushington, and the Honourable Dame Teresa Mary Josephine Doughty Tichborne, and the Honourable William Stourton, as guardians of Sir Henry Alfred Joseph Doughty Tichborne, Baronet, an infant, as the defendants, came on to be tried in due form of law, and was then, to wit on the day and year aforesaid, and on divers other days aforesaid, and before the taking of this inquisition by due adjournments in that behalf, to wit at Westminster aforesaid, tried by a jury of the said county in that behalf duly sworn to try the matters in question in the said issue between the said parties, upon which trial the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, then appeared as a witness for and on behalf of himself, so being such claimant as aforesaid in the said action, and was then and there, to wit by and under the said name and description of Sir Roger Charles Doughty Tichborne, Baronet, duly sworn, &c., before the said Sir William Bovill, Knight, so being such Chief Justice as aforesaid, that the evidence which he the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, should give to the Court there, and to the said jury so sworn as aforesaid touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth, the said Sir William Bovill, Knight, so being such Chief Justice as aforesaid, then having

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sufficient and competent authority to administer the said oath to him in that behalf. And the jurors first aforesaid, on their oath aforesaid, do further present that at and upon the trial of the said issue so joined between the said parties as aforesaid; and in relation thereto the following questions respectively became and were material, that is to say, whether the said claimant was Roger Charles Tichborne, the eldest son of James Tichborne, Esq., &c. (with other allegations of materiality corresponding with all the assignments of perjury). And the jurors first aforesaid, &c., do further present that he, the said Castro, &c., baronet, so being such claimant, and being so sworn as aforesaid, and contriving and intending to pervert the due course of law and justice, and unjustly to aggrieve the said defendants in the said action, to wit, upon the trial of the said issue, to wit, &c., upon his oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said jurors so sworn as aforesaid, and before the said Sir William Bovill, &c., so being Chief Justice as aforesaid, did depose and swear, amongst other things in substance, and to the effect following; that is to say: That he, the said Thomas Castro, was Roger Charles Tichborne, and that he was Roger Charles Tichborne, the eldest son of the said James Francis Tichborne, Esquire, afterwards Sir James Francis Doughty Tichborne, baronet, deceased. And that he, the said Thomas Castro, had resided at Paris from time of his birth until the year of our Lord one thousand eight hundred and forty-five; and that a person named Chatillon, to wit, the said Adrien Chatillon, had been his tutor; and that he, the said Thomas Castro, in the year of our Lord one thousand eight hundred and forty-five, came over from France to England to attend the funeral of the said Sir Henry Tichborne, Baronet, deceased; and that he, the said Thomas Castro, had been a student at the Jesuits' College, at Stoneyhurst, in the county of Lancaster; and that he, the said Thomas Castro, had been an officer in Her Majesty's army; and that he, the said Thomas Castro, had in the month of July, or in the month of August, in the year of our Lord one thousand eight hundred and fifty-two, seen the said Lady Doughty, to wit, the said Honourable Dame Katherine Doughty, then the wife of the said Sir Edward Doughty, Baronet, and her daughter, the said Katherine Mary Elizabeth Doughty, spinster, now the wife of the said Joseph Percival Pickford Radcliffe, Esquire, in the drawing-room at Tichborne House, in the county of Southampton; and that he, the said Thomas Castro, had, in the month of July or in the month of August, in the year of our Lord one thousand eight hundred and fifty-two, seduced the said Katherine Mary Elizabeth Doughty, spinster, now the wife of the said Joseph Percival Pickford Radcliffe, Esq.; and that he, the said Thomas Castro, had, after the twenty-second day of June, in the year of our Lord one thousand eight hundred and fifty-two, and before the month of March, in the year of our Lord one thousand eight hundred and fifty-three, seen the said Katherine Mary Elizabeth Doughty,

spinster, now the wife of the said Joseph Percival Pickford Radcliffe, Esquire; and that he, the said Thomas Castro, had seen the said Miss Hales, to wit, Mary Hales, spinster, in the presence of her mother or her aunt, at Canterbury, in the county of Kent; and that he, the said Thomas Castro, had been at the house of the said Captain and Mrs. Washington Hibbert, called Bilton Grange. And that he, the said Thomas Castro, had never been to Lloyd's aforesaid, to wit, Lloyd's rooms aforesaid, at the Royal Exchange, in the City of London; and that he, the said Thomas Castro, was not Arthur Orton, the son of George Orton, of Wapping aforesaid, deceased; and that he, the said Thomas Castro, had never been at Wapping aforesaid, before the year of our Lord one thousand eight hundred and sixty-six; and that he, the said Thomas Castro, had never gone by the name of Arthur Orton; and that he, the said Thomas Castro, did not leave England in a vessel called the *Ocean* in the month of April, in the year of our Lord one thousand eight hundred and forty-eight, and did not arrive at Valparaiso aforesaid, in the said vessel called the *Ocean*, in the month of November, in the year of our Lord one thousand eight hundred and forty-eight. And that he, the said Thomas Castro, had not been at any time between the year of our Lord one thousand eight hundred and forty-eight and the year of our Lord one thousand eight hundred and fifty-one at Melipilla aforesaid, in the Republic of Chili; and that he, the said Thomas Castro, did not, in the year of our Lord one thousand eight hundred and fifty-one, come back from Chili aforesaid to England in a vessel called the *Jessie Miller*; and that he, the said Thomas Castro, had not seen the said Mary Anne Loader before the year of our Lord one thousand eight hundred and sixty-seven, and did not keep company with her in the year of our Lord one thousand eight hundred and fifty-one; and that he, the said Thomas Castro, had never written letters to the said Mary Anne Loader. And that he, the said Thomas Castro, did not go out to Hobart Town in a vessel called the *Middleton*, of which a person named Story was captain or master; and that he, the said Thomas Castro, had not seen the said Elizabeth Jury, and Mary Anne Tredgett, and Margaret Anne Jury, now deceased, or any of them, on more than one occasion before the said trial. And that he, the said Thomas Castro, had not in the year of our Lord one thousand eight hundred and fifty-nine, at Castlemaine, in the colony of Victoria, in the name of Thomas Castro, been charged, jointly with Arthur Orton, with horse-stealing. Whereas in truth and in fact he, the said Castro, &c. [negating the truth of each statement]. And so the jurors first aforesaid, upon their oath aforesaid, do say that the said Thomas Castro, otherwise, &c., of his own wicked and corrupt mind, to wit, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly, did commit wilful and corrupt perjury, &c.

*Second Count.*—And the jurors first aforesaid, upon their oath aforesaid, do further present that, heretofore, before the

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taking of this inquisition, to wit, on the seventh day of April, 1868, a suit had been commenced and was depending in Her Majesty's High Court of Chancery, wherein the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, was the plaintiff (but who therein sued by the said name and description of Sir Roger Charles Doughty Tichborne, Baronet), and wherein the Honourable Teresa Mary Josephine Doughty Tichborne, widow, the Honourable William Stourton Renfric Arundell Edward Hopkins, now deceased, Roger Joseph Doughty Tichborne, an infant, under the age of twenty-one years, and Henry Alfred Joseph Doughty Tichborne, also an infant, under the age of twenty-one years, were defendants, in which said suit the said Thomas Castro, &c., to wit, by his amended bill of complaint duly filed therein, prayed, amongst other things, that in case it should be deemed requisite for him, the said plaintiff in the said suit, to take any proceedings at law, by ejectment or otherwise, to recover possession of certain estates called the Tichborne estates, that the said defendants, their attorneys and agents, might be respectively restrained by the order and injunction of the said court from setting up, or causing to be set up, in bar, or by way of defence to any of such actions, certain outstanding terms, charges, orders, proceedings, and legal estates in the said amended bill of complaint mentioned or referred to. And the jurors first aforesaid, on their oath aforesaid, do further present that the said suit in the said High Court of Chancery, being so depending as aforesaid, the said Thomas Castro, otherwise called Arthur Orton, &c., according to the practice of the said High Court of Chancery, to wit, on the 8th day of April, 1868, duly gave notice to the said defendants of a motion intended to be made by him, the said plaintiff in the said suit, to the said High Court of Chancery for a decree therein, and which said motion for decree was afterwards duly, and according to the practice of the said court, made and heard by and before the said court. And the jurors, &c., further present that whilst the said suit was so depending as aforesaid, and before the giving notice of the said motion for decree, to wit, on the said 7th day of April, 1868, he the said Thomas Castro appeared in his own proper person before one William Newman, then being a London Commissioner duly appointed to administer oaths in Chancery, to wit, in the City of London, and within the jurisdiction of the Central Criminal Court, and then produced and tendered a certain affidavit in writing of him, the said Thomas Castro (but who in and by the said affidavit in writing was named and described as Sir Roger Charles Doughty Tichborne, Baronet), entitled in the said suit, and intended and purposed by him, the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, to be filed in the said High Court of Chancery, and to be used and read as evidence at the said hearing in support of the said motion for decree, and which

said affidavit was afterwards duly, and according to the practice of the said High Court of Chancery, filed in the said Court, and used and read on the hearing of the said motion for decree. And the jurors first aforesaid, upon their oath aforesaid, further present that the said Thomas Castro, &c., was thereupon, to wit, on the said seventh day of April, in the year of our Lord, one thousand eight hundred and sixty-eight, in due manner and form of law, sworn and took his corporal oath, upon the Holy Gospel of God, before the said William Newman, that the several matters in the said affidavit contained were true, he the said William Newman then being such London Commissioner as aforesaid, and then having lawful and competent power and authority to administer the said oath to the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, in that behalf. And the jurors first aforesaid, upon their oath aforesaid, further present that for the purpose of the said motion for decree, and of the said hearing thereof, in the said suit so pending as aforesaid, in the said High Court of Chancery to wit, at the time of the swearing of the said affidavit, and at the time of the said hearing respectively, the following questions respectively had become and were material, that is to say, whether he the said Thomas Castro, otherwise, &c., was the eldest son of the late Sir James Francis Doughty Tichborne, tenth Baronet of Tichborne, deceased. And whether he the said Thomas Castro (repeating the allegations, &c., of materiality). And the jurors aforesaid, &c., do further present that the said Thomas Castro, being so sworn as in this count aforesaid, and contriving and intending to pervert the due course of law and justice, and unjustly to aggrieve the said defendants in the said suit, to wit, on the said seventh day of April, 1868, in and by his said affidavit in writing upon his oath aforesaid before the said William Newman, so being such London Commissioner as aforesaid, unlawfully, falsely, corruptly, knowingly, wilfully, and maliciously did depose and swear amongst other things in substance and to the effect following; that is to say, that he the said Thomas Castro, otherwise, &c., was the eldest son of the said late Sir James Francis Doughty Tichborne Baronet, of Tichborne, deceased, and that he, the said Thomas Castro, had resided at Paris aforesaid from the date of his birth until the year of our Lord one thousand eight hundred and forty-five, and that he was then brought over from Paris to England, and afterwards placed at the Jesuits' College at Stoneyhurst, in the county of Lancaster, and that in the month of July, 1849, he, the said Thomas Castro, had been appointed cornet and subsequently lieutenant in Her Majesty's 6th Dragoon Guards (Carabineers), and that he had joined the said regiment, in the month of October, 1849, at Dublin, and remained on duty with the said regiment from the said month of October one thousand eight hundred and forty-nine until the month of January in the year of our Lord one thousand eight

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hundred and fifty-three (except during temporary leave of absence), and that he had retired from the said regiment in the month of February, 1853, and that in the month of March, 1853 he had taken passage on board a ship bound for Valparaiso, to wit, Valparaiso, in the Republic of Chili, and arrived there in due course, and from that time until the month of April in the year of our Lord one thousand eight hundred and fifty-four had travelled from place to place in various parts of South America, and that in the month of April, 1854, he had, at Rio, to wit, Rio de Janeiro, taken his passage in the said ship *Bella* of Liverpool for New York aforesaid. Whereas in truth and in fact he, the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Baronet, was not and is not the eldest or other son of the said late Sir James Francis Doughty Tichborne, tenth Baronet, of Tichborne, deceased. And whereas in truth and in fact he, the said Thomas Castro, otherwise, &c. (allegation of the falsehood of all the defendant's statements), and so the jurors aforesaid, upon their oath, do say that the said Thomas Castro, otherwise called Arthur Orton, &c., of his own wicked and corrupt mind, to wit, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury, &c., to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her Crown and dignity. (a)

The record then, after the necessary "continuances," went on to state the verdict and judgment in these terms: "The jurors, on their oaths, say that the said Castro is guilty of the premises above charged in and by both the said counts, whereupon, all and singular the premises being seen and understood by the Court, it is considered, adjudged, and ordered, that he, the said Castro, for the offence charged in and by the first count of the indictment, be kept in penal servitude for the term of seven years now next ensuing; and that for and in respect of the offence charged in the second count of the indictment, he be kept in penal servitude for the further term of seven years, to commence immediately upon the expiration of the said term of penal servitude for his offence in the first count charged; and he is now committed into the custody of the keeper of the gaol of Newgate, to be by him kept in safe custody in execution of this judgment."

Error had been brought upon this record (b), and the errors

(a) Not *contra formam statuti*, as it was an indictment at common law.

(b) The 2 Geo. 2, c. 25, s. 10: The more effectually to deter persons from committing perjury and subornation of perjury, besides the punishment already to be inflicted by law for so great crimes, it shall be lawful for the court or judge before whom any person shall be convicted of wilful perjury, or subornation of perjury, to order such person to be transported for a term not exceeding seven years, and thereupon judgment shall be given that the person convicted shall be transported accordingly over and besides such punishment as shall be adjudged to be inflicted on such person agreeable to the laws now in being, &c. 20 & 21 Vict. c. 8, s. 2, enacts that any person who before the passing of that Act might have been sentenced to

assigned were, in effect, not simply on the ground that under the statutes one sentence of penal servitude only could be in the same trial inflicted for one term of seven years, but that, in general, cumulative sentences or different counts are not allowable.

The formal assignment of errors was as follows :

That in the record and proceedings aforesaid, and also in the giving of judgment against the said Thomas Castro, alias, &c., there is manifest error in this, to wit—

1. That whereas the offence of perjury with which the said Castro is charged in the indictment under two counts, and in respect of which he was convicted and sentenced to two several terms of seven years penal servitude, as for two distinct and separate offences is one offence only, and in respect thereof one sentence only can by the law of this realm be imposed ; therefore in that there is manifest error.

2. That whereas by the law of this realm perjury cannot be committed except where an alleged false statement is material to an issue depending in a judicial proceeding before a competent court ; and whereas the alleged false statement in the second count of the indictment in the record aforesaid upon which the said Castro was convicted and sentenced as aforesaid was made in an affidavit upon a motion by the said Castro before His Honour Vice-Chancellor Stuart in the High Court of Chancery for an injunction to restrain certain persons from certain acts, to wit, from setting up or causing to be set up certain defences in an action of ejectment then pending in Her Majesty's Court of Common Pleas, and whereas upon the hearing of the said motion His Honour the said Vice-Chancellor Stuart made an order to stay all proceedings therein until the questions put in issue by the alleged false statement aforesaid were tried and determined by Her Majesty's Court of Common Pleas in the said action of ejectment, and whereas there was no issue to the said proceeding before His Honour Vice-Chancellor Stuart upon which perjury could be assigned, but the only issue was that tried and determined by Her Majesty's Court of Common Pleas aforesaid, therefore in that there is manifest error.

3. That whereas the said Castro was tried, convicted, and sentenced as for two distinct and separate offences in one indictment, and whereas the misdemeanor of perjury with which the said Castro was charged in the indictment in the record aforesaid, being an offence against justice and the Crown and *nomen collectivum*, is incapable in its nature of being treated as a several offence in one indictment ; therefore in that there is manifest error.

4. That whereas it is not and never hath been the law of this realm to charge any subject with several and distinct offences under several counts in one indictment, except only where special provision for so doing has been made by Act of Parliament, and transportation should be liable to be kept in penal servitude for a term of the same duration as the term of transportation.

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whereas the said Castro was charged with two distinct and several offences of perjury as aforesaid under two counts in the indictment in the record aforesaid, and whereas there neither is nor was any Act of Parliament authorising the indictment of the said Castro as aforesaid; therefore in that there is manifest error.

5. That whereas it is not now and never hath been the law of this realm to put any subject upon his trial for two distinct and several indictable offences collectively, that is to say, to charge him with distinct and several indictable offences, and to put him upon his trial for both at one and the same time, and whereas the said Castro was charged with two distinct and several indictable offences as aforesaid, and was tried upon both collectively at one and the same time; therefore in that there is manifest error.

6. That whereas by the law of this realm every subject who is put upon his trial for any offence or offences against justice and the Crown, whether of felony or of misdemeanor, hath a right of challenge to the jurors impanelled both of array and of poll in respect of every offence as aforesaid with which he is charged, and whereas the said Castro, being indicted as aforesaid for two several and distinct offences, and tried upon both collectively, was deprived of the said right of challenge to which he was entitled as aforesaid in respect of the offence charged in one or other count of the said indictment; therefore in that there is manifest error.

7. That whereas the jurors impanelled to try the issue joined between Our Sovereign Lady the Queen and the said Castro as aforesaid upon the hearing of the evidence for the prosecution and the defence of the said Castro, and the summing up thereon of the Judges of Her Majesty's said Court of Queen's Bench then and there presiding, found a general verdict upon both counts and not two separate verdicts one upon each count of the indictment in the record aforesaid, that is to say, a verdict of guilty of the premises therein, and whereas the said premises are identical, and there is but one finding of guilty thereof, and whereas the said Castro was sentenced as if two separate verdicts had been found by the jurors aforesaid, and not one general verdict; therefore in that there is manifest error.

8. That whereas the said Castro, &c., was tried and convicted upon two counts in one indictment in the record aforesaid, and two several judgments were delivered in respect of the two counts in the indictment in the record aforesaid, and whereas by the common law of this realm one judgment only may be delivered in respect of one indictment, and whereas there is no statutory provision to the contrary in respect of the offence with which the said Castro was indicted as aforesaid, therefore in that there is manifest error;

9. That whereas the said Castro was tried and convicted upon two counts in one indictment in the record aforesaid, and a separate cumulative sentence of seven years penal servitude was imposed in respect of each count of the indictment in the record



aforesaid, and whereas by 2 Geo. 2, c. 25, s. 2, (a) and the Acts of Parliament amending the same the maximum term of penal servitude to be inflicted in respect of the offence charged in the indictment in the record aforesaid is seven years only; and whereas by the law of this realm no penalty can be imposed for any offence or offences charged in one and the same indictment greater than the maximum penalty imposed by the law for such offence or offences (b), therefore in that there is manifest error;

10. That whereas by the law of this realm no court or judge had or has power to pronounce upon any subject convicted upon proper and lawful trial of any indictable offence or offences a sentence of penal servitude or of imprisonment to begin to run from a future day, or upon or after the expiration of another term of penal servitude or of imprisonment, pronounced by the same court or judge upon the same person in respect of the same indictment, except only where special provision for so doing has been made by Act of Parliament, and whereas there neither is nor was at the date of the trial and sentence of the said Castro any Act of Parliament in being to empower the said Court of Queen's Bench to impose a term of penal servitude upon the said Castro, to begin to run at a future day or upon or after the expiration of the term of seven years' penal servitude imposed upon him in respect of the first count of the indictment, and whereas the said Court of Queen's Bench did so impose a second term of penal servitude upon the said Castro, to begin to run at a future day, that is upon or after the expiration of the first term of penal servitude as aforesaid, therefore in that there is manifest error;

11. That whereas under 2 Geo. 2, c. 25, s. 2, and the Acts of Parliament amending the same a sentence of penal servitude could and can be pronounced by a court or judge in respect of the misdemeanor of perjury as a punishment additional only to that already known to the law, and to be inflicted in conformity therewith, and whereas upon the conviction of the said Castro the said Court of Queen's Bench pronounced sentence of penal servitude upon the said Castro, not as a punishment additional to that already known to the law as aforesaid, but as a punishment separate from and independent thereof, therefore in that there is manifest error;

12. That whereas by the law of this realm where any subject shall have been or shall be properly and lawfully convicted of the misdemeanor of perjury, the court or judge before whom he shall have been or shall be so convicted, was and is and always hath been bound to pronounce a sentence of punishment in conformity

(a) That the court before whom any person shall be convicted of perjury, may, over and besides such punishment as may be imposed according to the law then in force, sentence such person to transportation not exceeding seven years. *Vide ante*, note (b) p. 442.

(b) No error was assigned that on the terms of the statute the judge had only power to inflict a single sentence of seven years' penal servitude, though at the time the 2 Geo. 2, c. 25 passed (1729) counts for different offences could not be joined. The error assigned was that, as a general rule, sentences on one indictment must not exceed the maximum for a single offence.

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with the common law, and the statutes relating thereto enacted prior to the aforesaid statute of 2 Geo. 2, c. 25, and then and now in force (a), and whereas the said Court of Queen's Bench, upon the conviction of the said Castro, omitted and neglected, contrary to the common law and the statutes relating thereto enacted prior to the aforesaid statute of 2 Geo. 2, c. 25, and then and now in force as aforesaid, to pronounce any such sentence as aforesaid, therefore in that there is manifest error.

*Benjamin, Q.C. and Atherley Jones*, for the prisoner.—First, only one offence is charged in the indictment. This is an indictment at common law. The two counts (which are in the indictment inverted in order of time) show in effect one proceeding, in which in effect there was one oath and one offence, notwithstanding the numerous assignments. For the first count shows an action was pending for the recovery of the Tichborne estates, and the suit in equity mentioned in the second count was ancillary to it, and was in fact preliminary to it. There was therefore, in substance, only one proceeding, the action itself; and the defendant was only liable for the one oath taken in that action. His oath in the proceeding in equity was not in a legal sense "material," and, at all events, could not be the subject of indictment at common law, as at the time the affidavit was sworn in Chancery no action was pending, nor anything sought except facility to bring such action, so that this not being an indictment under the statute of Elizabeth (b), but at common law only one offence is laid in it, viz., the perjury assigned in the first count as committed in the action at law. [BRAMWELL, L.J.—Is it meant to contend that false swearing in the suit in Chancery would not be indictable as perjury?] Not, it is conceived at common law. Secondly, there was only a conviction for one offence. The verdict as recorded, was guilty of "the premises above charged in both the said counts," but one of them does not show an offence, and as to the other, that verdict does not imply that he was guilty on all the assignments, for the count would be supported if any one of them was sustained in evidence. Holt, C.J. said: "That on an indictment for perjury it does not signify how many assignments there are; twenty may be bad, and one good; but that is enough, and the defendant may be

(a) The only statute upon the subject in force prior to the statute of Geo. 2 was the Act of 5 Eliz. c. 9, which (sect. 6) provided that if any person should commit perjury by deposition in any of the king's courts, or being examined *ad perpetuam rei memoriam*, the person offending should forfeit 20*l.* and be imprisoned for six months, an enactment which, as perjury in the counts of common law was already punishable by fine and imprisonment, in the discretion of the court, could only have been necessary or intended to apply to perjury by affidavits or deposition in the Courts of Chancery. It appears that there was no punishment for perjury in Chancery prior to that statute, but that it was only punished in the Star Chamber (see Hudson's Treatise on the Star Chamber), and certainly after the statute it was usual to proceed under it in such cases. It was not assigned as error, however, that the second count on the affidavit in Chancery, not being under the statute, was bad.

(b) The 5 Eliz. c. 9, s. 6, provides that any person who shall commit perjury in any deposition, shall forfeit 20*l.*, and be imprisoned six months, or be put in the pillory, &c.

convicted. The judgment is not for his said several offences, but for his said offence.”(a) And Lord Denman, C.J. in *Reg. v. O’Connell* (b), said that was correct. [JAMES, L.J.—That applies only to different assignments in the same count. Here there are different counts, each for a false oath on a separate occasion, in the action and in the Chancery suit, and the verdict is guilty of the premises in both counts.] It is submitted that the legal effect of the verdict is only that the defendant was guilty of perjury. “The perjury charged is considered as one offence. The assignments are offered to substantiate it :” per Lord Campbell in *Reg. v. O’Connell*. Where there are two counts for perjury the offence is properly described in the judgment as “the said misdemeanour and perjury” (*Reg. v. Ryalls*. (c) [JAMES, L.J.—Misdemeanour—*i.e.*, misbehaviour—is a general term and would include all the misdemeanours or offences charged in the indictment.] It is admitted that that is so, and that several misdemeanours of the same nature may be joined in the same indictment. But still it is conceived that they are all regarded as constituting one offence and that there can be but one judgment on the whole. Thirdly, the sentence could therefore only be for one offence, and consequently could not legally exceed the maximum laid down in the statute. Either the maximum sentence should be decided and apportioned among the different counts, or if it be inflicted on all the counts, the sentences should be made to run concurrently, so as really to inflict only one. No doubt there is a dictum of the Judges that sentences of imprisonment may be consecutive (*Rex v. Robinson* (d), but not where they would exceed the statutory maximum. In that case the prisoner had been convicted on more counts than one of an offence against the Coining Acts, for which the maximum sentence was imprisonment for a year, and he was sentenced on two counts to imprisonment for two years, and the judges held the conviction bad. That was the whole decision. It is true they added that “there ought to have been consecutive sentences for one year each,” but it was only an *obiter dictum*, and, as that point did not arise, it did not amount to a judicial decision upon it. All that was or could be decided was that the judgment given was wrong, and that supports the argument. Fourthly, without statutory authority, consecutive sentences of imprisonment or penal servitude cannot be inflicted on the same indictment. In the case of *Rex v. Wilkes* (e) that difficulty was avoided, even on different indictments, by making the second sentence run concurrently with the first, but making it longer than the first, so as to extend beyond it, though both together did not exceed the maximum. The maximum was two years’ imprisonment: the first sentence upon one indictment

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(a) *Reg. v. Rhodes*, 2 Lord Raymond, 886.

(b) 11 Clarke and Finnely Rep. 155, 330, 375.

(c) 11 Q. B. 781.

(d) 1 Moody’s Crown Cases, 414.

(e) 4 Brown’s Parliamentary Cases, 360; 4 Burrow’s Rep. 2527.

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was for ten months; the second, which was to begin and run at the same time as the first, was for twelve months; and thus it was not a sentence to commence *in futuro* (as this is), and both sentences together did not exceed the maximum. But, as there were different indictments in that case, it is no authority for the present. The power here assumed as to cases of misdemeanour requires to be given by statute, and was so given by statute in cases of felonies by 7 & 8 Geo. 4, c. 10, but it has not been given to misdemeanours, that is, the power of inflicting on different counts consecutive sentences, even exceeding the maximum. [JAMES, L.J.—That statute was passed long after *Wilkes's* case. May it not have been supposed that the power already existed in cases of misdemeanour?] There is no authority for supposing that it did so exist, and the fact that it was given by statute in cases of felony rather shows that it did not. Fifthly, the statute in this case certainly gives a power of inflicting consecutive sentences, but of a certain limited duration. The statute provides that the sentence of transportation may be inflicted “over and besides such punishment as might be inflicted by the laws then in being”; that is, at common law—imprisonment; and by the statute of Elizabeth six months’ imprisonment, in addition to a certain fine. This only authorises a sentence of imprisonment and in addition thereto a sentence of penal servitude, and so it has been held (*Rex v. Price*.(a) This indeed is an indictment at common law, so that the punishment under the statute of Elizabeth could not be inflicted: (Chitty’s Criminal Law, vol. 2, p. 314.) And therefore it may be contended that the sentence authorised by the statute of Geo. 2 could not be inflicted, as it can only be inflicted in addition to the punishment already allowed by law, *i.e.*, at common law, and also by the statute of Elizabeth; but, at all events, there ought to have been a sentence of imprisonment, and then in addition thereto the sentence of penal servitude, and so the sentence inflicted was not warranted by the statute, and, as it was a statutory authority specifically to inflict such a punishment as penal servitude, it required to be strictly pursued as it was in the cases of *Luie* and *Brown* (b) tried after the claimant. Sixthly, the statutory authority was only to inflict a sentence of penal servitude not exceeding seven years; so that there was no authority to inflict more than a single sentence of penal servitude for the maximum of seven years. This is the substantial point, though it only goes to the second sentence; that the statutory power has been exceeded in this sentence, and that there was no authority to inflict the second sentence of seven years’ penal servitude. This point arises on the plain terms of the statute itself, which provides that the judge before whom any person is convicted of perjury may order such person to be transported for a term not exceeding seven years—that is, the judge

(a) 6 East’s Reports, 328.

(b) At the O. C. C. April Sessions 1874 *coram* Brett, J.

who tries the person has only power to inflict a sentence of penal servitude for seven years. [JAMES, L.J.—For the same offence ?] It is not so expressed, and a highly penal enactment cannot be extended by implication. The only power given is to inflict a sentence of seven years' penal servitude for whatever offences he is convicted of at the same trial. The judge who tries the party is to have that power and no more. The power to exceed a maximum by means of cumulative sentences has never been given by statute in cases of misdemeanour, and does not exist. It has been decided by the Supreme Court of New York that no such power exists according to the English common law : (*The People ex rel. Tweed v. Liscomb.*) (a) It was on the authority of that case the writ of error was granted in the present case, and it is one of great authority. In that case the defendant had been tried upon an indictment containing 220 counts, each charging a misdemeanour, neglect of a statutory duty, for which the maximum punishment fixed by the statute under which he was indicted was imprisonment for a year and a fine. He was found guilty upon 204 of the counts ; and upon twelve of them the court sentenced him to twelve successive terms of imprisonment of one year each, and also to twelve fines of the maximum amount ; and upon a writ of *habeas corpus*, brought by the defendant after he had suffered the first sentence, it was held by the Supreme Court not merely that the judgment was erroneous, which would not have been sufficient for his discharge under a *habeas*, but that the second and all subsequent sentences were not warranted by law, and so without jurisdiction, on the ground that the punishment allowed by law for the offence was the maximum, which the Court had power to inflict in the same prosecution, and that the statutory power was exhausted in the first sentence, and was exceeded in all the others. Allen, J. said in giving judgment (p. 573) : " Bearing in mind the distinction between judgments merely informal or erroneous, and those void as without jurisdiction *coram non judice* the question is, had the Court power to pronounce the several judgments, and inflict the accumulated punishments upon the conviction of the prisoner of the offences as charged in the single indictment ? Whether it was error to join in the same indictment counts for several distinct offences, or whether the Court should have compelled the prosecutor to elect between the several counts are not questions that can be considered upon this hearing. They do not go to the jurisdiction of the Court, and can only come upon error from the judgment. . . . This renders it unnecessary to consider—except as they may incidentally aid in the consideration of the question actually presented—those cases in which the question has been as to the propriety of uniting for the purposes of a trial several offences in one indictment." (b) After entering into the cases on that

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(a) Sickel's New York Reports, Court of Appeal, vol. 15, pp. 559, 605, a decision of seven judges.

(b) If the counts could not be joined, it would be error ; if they could be, but they were embarrassing, the prosecutor would be put to elect : (see 1 Moo. & Rob. 74.)

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question merely with that view, the learned judge went on to say : (a) " I am not aware that there are any precedents for the practice of several judgments, each for the extreme penalty of the law, for each of several offences, charged in the same indictment, and upon a single conviction. What is popularly known as the *Tichborne* case is claimed to be a direct authority for the conviction and sentences in the case at bar. The prisoner was convicted upon a trial before Cockburn, C.J. and his associates of two distinct acts of perjury upon separate counts in an indictment and sentenced upon each to penal servitude for the term of seven years, as for disconnected offences, and it is said that the time named is the extreme limit of punishment upon a single conviction for the crime charged. But if it be so, then there was a conviction for two offences, which in this State would be felonies, on the same trial, which is not permissible with us. The decision cannot be regarded as authoritative evidence of the law with us. It is enough to say that no question appears to have been made to the judgment, and whether it is authorised by some statute we do not know. Be that as it may, the judgment has not received the deliberate sanction of any Court in *banco*, and has not ripened into a precedent even in England. It is at most but evidence of what the common law is as now administered in that country, but no evidence as to what it was on the 19th day of April, 1775. (b) The practice of uniting several counts in an indictment is a departure from the ancient practice. Lord Denman says, in *O'Connell v. The Queen* (11 Cl. & Fin. 375), that in old times the indictment consisted of a single count, (c) and it may be assumed that this is true. There is no objection to stating the same offence in as many different ways as may be deemed expedient. But the rule as now recognised extends further than this, and different misdemeanours, it is said, may be joined in the same indictment and tried at the same time. If there could be but one punishment, or punishment as for a single misdemeanour irrespective of the number of offences proved, the Court could possibly see that no great harm could come to the accused by a joinder of offences. If the rule has this limit, then there is reason for the limitation as found in the books, that to authorise a joinder of different offences, they must be of the same grade, and require the same judgment. If judgments may be distributive and cumulative, it is difficult to see why there should not be an identity as to their character and extent of punishment. Statutes have been deemed necessary to permit offences of different degrees, and requiring different punishments, although relating to the same subject-matter to be joined : (1 Arch. Crim.

(a) Pages 576, 577.

(b) The era of American Independence. *Benjamin*, Q.C. stated that the American Courts do not consider the decisions of our Courts since that era as *binding* authorities as they do those prior to that era.

(c) It is conceived that was so at the time of the passing of the statute of 2 Geo. 2 (1729), and that may explain a single maximum sentence and the absence of any allusion to several counts or offences.



Pr. 94)." Then after referring to the American cases on the subject, founded on the decisions of our Courts prior to 1775, the learned judge proceeded, (p. 579): "It will be seen that now arrant can be found in any of them for cumulative punishments upon a conviction for several offences charged in a single indictment, the aggregate punishment exceeding that prescribed by law for the grade of offences charged. The rule of law by implication calls for a single judgment for all the offences charged in the indictment, and of which the accused is convicted. It requires that the offences joined shall be of the same grade, and be subject to the same punishment; that is, not only punishment the same in kind, but the same in degree. This can only be important to the end that a single judgment, equally applicable to each of the offences, may cover all; and a sentence, the maximum of which may be lawfully imposed for each. If several judgments may be given upon a single indictment before a conviction for several disconnected offences, and the punishments may be successive and cumulative, there is no good reason why the offences joined should be of the same grade or subject to the same punishment; for the court might so impose the sentences for the respective offences, that each could be fully carried out without interfering with the others. A prisoner convicted of several misdemeanours, for which different penalties were prescribed, might be flogged for one, fined for a second, and imprisoned for a third. If the doctrine contended for by the prosecution can be maintained, the qualification of the rule that the joined offences must be equal in law, and subject to the same punishment, has no foundation in principle, and must fall. If as has been done in some cases, the maximum punishment which the law permits for the grade and character of offences charged is distributed among the several offences of which the prisoner is convicted, according to the demerits of each, the aggregate punishment not being in excess of that allowed by law for a single offence of the same kind and degree, there would probably be nothing illegal, conceding that a person accused of crime may be tried upon one indictment for several and distinct offences committed at different times. . . . The practice (p. 581) of putting a man on trial for distinct offences at the same time is fraught with danger to the accused, and can never be done except at great risk of doing injustice. But if the practice should be regarded as so firmly established, that it cannot be reformed except by the Legislature, the result of distinct judgments and cumulative punishments does not follow legally, logically, or necessarily. Reference will be made to the reported decisions in England, in which it is claimed that the foundation was laid, not only for the joinder of several distinct misdemeanours in one indictment, but for cumulative sentences or punishments. But it is quite evident that there would probably be no precedents of cumulative punishments each to the full measure allowed by law, for in England the punishment for misdemeanour is, as a rule, discretionary with the court:

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(1 Russell on Crimes, 92 ; 1 Chitty's Criminal Law, 710.) And as the court could on a conviction for one or more misdemeanours pass such judgment and impose such punishment as it should deem proper and apportioned to the cause or crimes charged, cumulative sentences, each fully exhausting the statutory power of the court in respect to a single offence, could not be imposed, as there is no such limit ; and cases in England within this rule would give no colour or support to the present judgment. . . . *Rea v. Wilkes* (a) is not an authority for joining distinct offences in one indictment. It is an authority for sentence of imprisonment upon a second conviction to commence at the expiration of an imprisonment on a prior conviction. The report of the case shows that there were two informations for libels ; the defendant was convicted of both, and was separately sentenced for each. *Gregory v. The Queen* (15 Q. B. 974) was error from a conviction upon an information for libel, containing four counts, and the judgment of the court, sentencing the prisoner to be imprisoned for two months on each of the counts, the imprisonment on each after the first to be computed from the expiration of the imprisonment on the next preceding count. The third count was held defective, and the Court adjudged that the imprisonment on the fourth count was not thereby invalidated as commencing *in futuro*, but that it was to be computed from the expiration of the imprisonment on the second count. No other question was raised or decided. Whether the distributive judgment was legal was not considered, and the aggregate punishment was not in excess of that which might have been inflicted for a single offence. In *Young v. Reg.* (3 Term Rep. 98) the same offence was stated differently in three counts, but one transaction was under investigation on the trial, and, upon a general verdict of guilty, a single sentence was passed upon the prisoner. It was objected as error that distinct offences were joined in the same indictment, and Lord Kenyon said 'the objection would be well founded if the judgment on each count was different ; but he said in this case the judgment on the counts is the same—a misdemeanour is charged in each. Most probably the charges were meant to cover the same facts ; but, if not so, I think they may be joined in the same indictment.' The case gives no countenance to the doctrine of cumulative punishments, but by implication is adverse to it. . . . We (p. 585) are referred to the responses of the judges of England to certain questions propounded to them by the House of Lords in the case of *O'Connell* (11 Clark & Finnelly, 155). The verdict in that case was general upon all the counts of the indictment, and a like general judgment passed against the accused upon the verdict, without discrimination, and as one judgment. Some of the counts were bad, and the judgment was reversed for that reason. The contention was whether the verdict and judgment could be applied to the good counts, and thus sustained. The learned judges discussed at great length

(a) 4 Burrow's Reports, 2527 ; 4 Brown's Parliamentary Cases, 360.

the practice on trials of indictments for felonies and misdemeanours, and the rule as to joinder of counts for distinct offences on the two classes of indictments, but still nothing was definitely established in the judgment of the court, or can be gathered from the concurrent opinions of the judges, which will aid us in deciding upon this question. It would be difficult to deduce from the opinions collectively, or that of any single judge, that, when the punishment for a specific offence is limited by statute, and not by the discretion of the Court, and a conviction is had under an indictment consisting of several counts for several offences, distinct and distributive sentences could be imposed for the different convictions under the respective counts, which would aggregate a punishment in excess of that prescribed and limited by statute for a single offence; that is, that the several punishments combined could be in excess of that which could, pursuant to statute, be imposed upon a conviction under any one of the counts. The real question considered, and in respect to which these opinions must be read and interpreted, was whether the verdict and judgment could be applied to the good counts, and thus be sustained. There was clearly no excessive punishment over that which might have been inflicted upon a single conviction on any one of the counts. It may be conceded that expressions are used by some of the judges authorising an inference that the punishment in the aggregate upon several counts might be in excess of that which would in the discretion of the Court, not which could by law, be inflicted upon a single count or for a single offence. But it is not so said in terms, and certainly is not and could not have been so decided, and the judges were not called upon to, and did not, answer any interrogatory which could resolve the question. If the rule prevails, as is claimed in support of the judgment, it may and must have effect in all courts of criminal jurisdiction, whether general or limited, and a Court of Special Sessions, held by a single justice of the peace, may try an individual for any number of misdemeanours, of the same grade of which the Court has cognizance, at the same time, and upon a single complaint, and upon conviction impose successive and cumulative sentences of imprisonment, and fine to the full extent of the law for each offence. For the rule, if it exists, is part of the general law of general application. *Reg. v. Cutbush* (10 Cox C. C., p. 489) is, however, adverse to the logical sequence of the rule asserted, for there the cumulative sentences were sustained on what Cockburn, C.J. termed "some degree of technical straining" of the words of a statute, but for which the prisoner would have been discharged for the invalidity of the conviction and the sentences. This is very good evidence, "that the common law, as administered in England, does not authorise several convictions and cumulative sentences. . . . I have examined with some care the cases in the courts of this State and of England, and I find no authority for holding

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that the common law, as it existed in England in April 1775 (a) permits cumulative sentences to be imposed upon convictions for several distinct misdemeanours charged in different counts in a single indictment, in the aggregate exceeding the punishment prescribed by law as the extreme of punishment for a single misdemeanour. The power of the Court was exhausted by the first sentence. Any judgment in excess of the limit was without jurisdiction. A judgment to the extent allowed by law once pronounced, the power of the Court was exhausted in respect to that prosecution. If the punishment for the offence is fixed by statute, a judgment in excess of the statutory limit is void for the excess . . . . No Court can give a judgment not authorised by law. No Court can be competent to pronounce a sentence in open and palpable violation of a positive statute. Judgment thus given is simply void. . . . . No precedent has been found for the practice. The justification is to be found probably in the fact that great wrongs had been perpetrated, and the punishment as for a single misdemeanour was deemed entirely inadequate to the offence, and the public mind was greatly excited, and called for what would be thought an approximate vindication of the law, and an appropriate punishment of the offender. But the remedy was several indictments, if the offences were distinct. Courts can only administer the laws as they find them; and it is far better that those more guilty should escape than that the law should be judicially disregarded or violated. A greater public wrong would be committed, one more lasting in its injurious effects, and dangerous to civil liberty and the sacredness of law, by punishing a man against or without that law, but under colour of law and a judicial proceeding, than can result from the escape of the greatest offender, or the commission of the greatest crimes." Rapallo, J. concurred, and delivered judgment at some length to the same effect: (b) "The question is whether several offences, each amounting to a misdemeanour for which an indictment could be framed, may be charged in one indictment in separate counts, and the prisoner put upon his trial for all the alleged offences at the same time, before the same jury; and if the jury give a general verdict of guilty on all or several of the counts, whether the court has power to pronounce a separate sentence on each count upon which the prisoner is found guilty, and thus aggregate sentences on a single indictment and trial to an extent far in excess of the maximum punishment prescribed by statute for the grade of offence for which the prisoner has been indicted and tried. The generally received principle (p. 595) is that a man shall be tried for only one crime at a time. . . . . What (p. 598) is the authority upon which we are called to introduce this new practice? It is to be found only in the opinions of judges of courts in England, of a date later than that up to which by our constitution

(a) The date of the separation from this country; up to which time the decisions of our Courts were authorities binding.

(c) P 594.

we accepted the common law of England, and, unless in a single very recent case in which the question was not raised or discussed, or any reason given (the *Tichborne* case), no practical application of the rule appears from any of the cases cited to have been made, cumulating sentences on separate counts to an extent greater in the aggregate than could have been inflicted on either of the counts alone. . . . In this State the punishment for misdemeanour is limited by statute. The statute declares that every person who shall be convicted of any misdemeanour shall be punished by imprisonment not exceeding one year. Clearly there is nothing in this provision which points to more than one conviction or punishment on any one indictment . . . all that the Court had power to adjudge was that the defendant was guilty of a misdemeanour, and should receive the maximum punishment for the offence. Otherwise on conviction for misdemeanour the Court might impose heavier sentences than for the most aggravated felonies. . . . I am of opinion that on any indictment for misdemeanour, no matter how many counts it may contain, the power of the Court is restricted to the maximum punishment allowed by statute for the highest offence charged in the indictment, and that separate and cumulative punishments can only be secured by separate indictments and trials for each offence. The power of the Court was exhausted when it had imposed the first sentence, and it then ceased to be competent to render any further judgment in the case." The other five judges concurred, and the judgment was reversed. [JAMES, L.J. observed that this appeared to be the first case in which these views had been judicially expressed as to cumulative sentences on separate counts exceeding a statutory maximum.] It is conceived that the decision in that case was quite in accordance with the principles of our law, though no case which distinctly raised the question has occurred, and that of itself affords an argument that the course here taken, as it is novel, is erroneous and not warranted by law. [BRAMWELL, L.J.—The contention founded on that case is contrary to the opinion of the judges in *O'Connell's* case.] Not, it is conceived, to the decision in that case, nor indeed to any considered judicial opinion of the judges. It is certainly opposed to some dicta of individual judges, such dicta being neither unanimous nor necessary to the decision of the case.

The *Attorney-General* (Sir H. James) (with him the *Solicitor-General* (Sir F. Herschell), *A. L. Smith* and *Poland*, for the Crown), said he hardly thought it necessary to address the Court in support of the judgment. [JAMES, L.J. said he need only address himself to the contention founded on the decision in the American case that cumulative sentences could not be given on different counts charging different offences—misdemeanours—in the same indictment if they exceed in the aggregate the maximum amount of punishment.] The *Attorney-General* said the decision in that case appeared partly to have rested on American law and partly

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on a misconception of English law, and that it was inconsistent with the opinion of the Judges in *O'Connell's case* (*ubi sup.*), especially that of Patteson, J. A series of authorities show that consecutive sentences are allowed in misdemeanours. It was so in the case of *Wilkes* (a) as in the case of *Williams* (b), and, though these were cases of separate indictments, the principle is the same in *Robinson's case* (c); all the judges said in *O'Connell's case* that the prisoner should have been sentenced to consecutive sentences for the maximum duration of one year on separate counts. As to the aggregate amount of the consecutive sentences exceeding the maximum, the statute of 7 & 8 Geo. 4, c. 10, allowed it in cases of felony; and in the case of *Outbush* (d) it was said by the Court that previous to the statute the law was so in cases of misdemeanour.

*Benjamin* in reply, for the prisoner.—It could not have been the law before the statute as to misdemeanour, for it certainly was not so at common law. No authority has been or could be cited to show that it was so. [The *Attorney-General* (Sir H. James) stated, on the authority of Mr. Avory, Clerk of Arraignment at the Central Criminal Court, that in 1859 Bramwell, B. sentenced a man on more than one count to the maximum sentence for the offence, indecent assault. BRETT, L.J. stated that he remembered taking the same course.] It does not appear that in these cases there was a statutory maximum, and, at all events, these cases were not discussed; and the question has never until now been directly raised for decision.

At the close of the argument

The COURT at once proceeded to pronounce judgment for the Crown.

JAMES, L.J.—I am of opinion that this writ of error was improvidently issued. The power in question has been decided to exist by a current of authority and a course of practice which it is not open to any person in this country to question. The law is, and always has been, that counts for several misdemeanours may be joined in one indictment as it is called—that is to say, may be the subject of several distinct counts or charges, put together in one piece of parchment, but each count being in law a distinct charge or indictment, upon which the party ought to be tried and convicted or acquitted as the case may be. A practice has prevailed in cases of felonies, by which the judges, in the exercise of their power of regulating the proceedings before them, thought it right in capital cases—in times when nearly all crimes were capital—that a party should not be tried for more than one felony at the same time, in order that he might not be embarrassed or prejudiced by evidence as to other offences. (e) No such rule (e) prevailed with regard to trials for mis-

(a) 4 Burr. 2527.

(b) 1 Leach C. C. 536.

(c) Moody C. C. 414.

(d) 10 Cox C. C., 489.

(e) That is (it is presumed) the rule against joinder of counts. See *R. v. Gough* (1 M. & R. 74).



demeanour, though in a proper case, if the judge saw that there would be prejudice to the prisoner, he could call on the prosecutor to elect on which count to proceed. But these were mere matters of judicial discretion, for the exercise of which in no case could a writ of error be brought. Such being the law that a party might be tried at the same time, for several misdemeanours, the subject of several charges on several distinct counts, there is in my mind no possible or reasonable distinction to be drawn between a trial and conviction on several counts or charges in one indictment, and several trials and convictions on several indictments one after another. In the case of *Rex v. Wilkes* (a) it was certainly settled distinctly that for several misdemeanours, the subject no doubt of several indictments, one tried after the other, and on which the sentences were pronounced immediately, one after the other by the House of Lords, on the advice of all the Judges that one sentence of imprisonment could be passed to take effect after the expiration of imprisonment for another. So the law was laid down and from that time to the present it has remained unquestioned, and no judge has ever in this country expressed the slightest doubt of that being the common law of England. It is too late now, after the lapse of more than a century, to attempt to dispute the law so laid down and acted upon in hundreds and thousands of instances. That law does not seem to have been questioned even in the case in the New York Court of Appeal to which we have been referred as establishing this exception from a restriction on the law so laid down. And we are told that this was the case on the authority of which the late Attorney-General was induced to issue his *fiat* for the writ of error in the case now before us. In that case it is laid down that the law does not permit cumulative sentences to be imposed on conviction for several misdemeanours charged in different counts in a single indictment, in the aggregate exceeding the punishment prescribed by law as the extreme limit of the punishment for the single misdemeanour. It is conceded that there is no such decision to be found in any case in the English law books, and indeed it is to be inferred that there is no such doctrine laid down in any case even in any of the United States which have adopted the English common law. Then are we to follow that court and say that this restriction was properly laid down on what up to that time had always been laid down generally and without any qualification? I have always felt unfeigned respect for the decisions of the courts in America, which have dealt with matters of law common to their jurisprudence and ours. But I am bound to say that I am startled by the mode in which these judges dealt with the question, both with reference to authority and principle. The judges seem to have thought it sufficient to say, and this indeed is their *ratio decidendi*, "It is true that no

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(a) 4 Brown's Parliamentary Cases, 360; 4 Burr. 2527.



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such distinction can be found in the English courts, or in the English text writers; but then the contrary has never been laid down. What we have got to decide is what the common law was in 1775—what it was then—and we cannot accept anything said or done by any court in England since then inconsistent with the law which has prevailed in our courts. If it is the law in England we will not allow the practice of our courts to be superseded.” And so, that they thought sufficient to get rid of the decision in the *Tichborne* case, (a) although it was a decision of the Court of Queen’s Bench—they got rid of it as not binding on them, and said that it is of no authority. But the decision in the American case is not binding upon us. It was a decision of three judges (b) overruling the opinion of three others in the court below, and the utmost that it comes to is that the contrary has never been distinctly laid down in any English court, and that the question has never been argued until now. (c) But what is the principle of the decision? On what ground does the distinction it sets up rest? I am unable to understand what is the principle; and at all events that suggested in argument was startling if not shocking. The proposition was this: that if a man commits an offence of so grave a character that the utmost punishment allowed by law for the offence was, in the judgment of the Court, too light, (d) he is to be free to commit any number of similar offences with absolute immunity if he is tried before, and with comparative impunity if his trial is postponed until he has fulfilled his sentence under the first, thus giving him the chance of escape, which lapse of time will always give. To my mind, such a proposition is startling, as no authority for it is to be found in English law, and there is to my mind no foundation for it in law. Indeed, the Court in their judgment seem to have proceeded on a view quite inconsistent with our law as to the impropriety of joining different offences in one indictment. That seems to have been the governing motive of their decision—the view which led them to the discovery, as they conceived, of this restriction or qualification upon the law laid down in *Wilkes’s* case. But the real point on which the writ of error was obtained was that the sentence was bad because it did not begin with a sentence of imprisonment at common law, and that the sentence of penal servitude was not by way of addition to that sentence of imprisonment. But that, by the statute, is only to be if imprisonment is adjudged; and it

(a) It was hardly a decision. The question was not raised; and, as it was not raised, was not discussed or decided.

(b) *Benjamin*, Q.C. interposed to state that this was an error, that it was the judgment of seven judges—six present, and, as the report stated, all concurring, the Chief Justice, who was absent, also concurring.

(c) It is believed that in no instance until this, ever since the statute of Geo. 2, passed in 1729, had a sentence exceeding seven years been passed for perjury.

(d) *Mellor*, J, in passing the sentence, had said that the punishment imposed by the statute was too light, and that the Legislature, in passing the statute, had not contemplated such a case; which hardly afforded a reason for exceeding it, and at the time it passed different offences could not be joined in one indictment.

is not necessary that it should be, and no injustice is done by its not being so, nor by not going through the form of imposing a day's imprisonment as a preliminary to the next sentence of penal servitude. That disposes of that point, and it is not necessary to resort to the statutory power of amending the judgment. Then it is said, that in truth and in substance all these perjuries were in reality only one, and that a sentence of fourteen years' penal servitude has been awarded for what was in substance a single perjury. It is said there was one fraud, one imposture, in pretending to be Tichborne, and that any number of perjuries committed on any number of occasions, in any number of suits, in any number of oaths, all constitute only one single perjury and one single offence. To my mind it is only necessary to state the proposition to dispose of it. It is monstrous to suppose that the law allows any number of perjuries to be committed, with only one punishment, merely because they were committed in furtherance of one scheme of fraud. There is nothing else left in the case, and I am therefore clearly of opinion that there is no error in the record, and that the judgment must be affirmed.

BRAMWELL, L.J.—I am of the same opinion, and really I have had great doubt whether I ought to do more than simply to express it. I am quite certain that the writ of error was not allowed by the late Attorney-General without due care, and I think indeed it was more than warranted by the case in the American Court. But the case is as clear as any that could come before a court of justice. As I understand it, the first point made was that, if a man brings a suit, or several suits, with a view to establish his right to certain property, he may commit any number of perjuries for that purpose, on any number of occasions, and that they will constitute a single offence of perjury, because the substance of them is that he is the person entitled to the property. But that the argument has actually been addressed to us, I should not have supposed it possible that it could be addressed to any court. It was admitted that if the party made any false statement on oath, he might be indicted and convicted; but then it was said he had power to swear as many more falsehoods as he pleased with impunity. It was said that it would be monstrous that he should be punished twice over under these circumstances. To my mind it would be monstrous if he could not be. And if he persisted in his offence by committing another perjury, I think he ought to be punished over again, and more punished than on the former occasion. So much for the first point. Then the next point was that, as the statute says that a person guilty of perjury shall be subject to seven years penal servitude, he cannot have more than that accorded to him for any number of perjuries—in distinct proceedings—that he acquires a sort of status of impunity, so that no amount of perjury will subject him to any further punishment. The whole of that argument was founded on this, that the statutes say that the

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person convicted of perjury shall be subject to penal servitude for not exceeding seven years. But the same argument might be used as to every offence—it may be said “he has done it, and that he may do it again.” What the statute means is that whenever the offence is committed the person convicted of it shall be subjected to this sentence. Then as to the next point, that the prisoner has been sentenced simply to seven years’ penal servitude, whereas it ought to have been by way of addition to a sentence of imprisonment. I doubt whether he could make that a ground of error, even supposing that he ought to have been so sentenced. I know that a man who was sentenced to be transported brought a writ of error, upon the ground that he ought to have been sentenced to be hanged. But that was different. He had a right to say that the wrong sentence had been passed upon him, a sentence not warranted by law. But the prisoner here could not say that. He could not say that he had had wrong done to him. The utmost he could say was that he had not had enough of right done to him. And I doubt whether a writ of error would lie under those circumstances. But it is not necessary to decide that, for there is nothing in the objection. The words of the statute are that the sentence of penal servitude shall be over and besides any other punishment which shall be adjudged upon him, which supposes that the court may or may not adjudge imprisonment, and, unless it is so adjudged, the sentence of penal servitude is not in addition to it, nor indeed can be. There is nothing therefore in the objection. Then as to the point on which the writ of error was allowed—that is, that there cannot be cumulative punishments on two offences, on different counts of an indictment for misdemeanours. The effect of the objection is that the judge cannot sentence a person upon one count to a punishment of a certain duration, and then on another count for a different offence to another punishment beginning at the expiration of the first. It could not of course be so in cases of capital offences in which the sentence on the first would be *quod suspendatur*. But the law is different in cases of misdemeanour, as appears from the case of *Wilkes* and other authorities. It was said indeed that there may be consecutive sentences on different counts, so that the maximum is not exceeded—that is, that in this case there may have been a sentence of two years’ imprisonment on the first count, and seven years’ penal servitude on the second, to commence on the expiration of the imprisonment, or five years’ penal servitude on the first count, and five years on the second, to commence from the expiration of the second year of the first term. But at common law there was no limit to the duration of imprisonment (except that there was a general principle laid down in Magna Charta, and recognised in the Bill of Rights, that punishments must not be excessive), so that at common law the difficulty would not arise; and at common law there might be imprisonment for seven years on one count

and seven years further on a second, to take effect at the end of the first term. But it is said that this cannot be done in the present case because of the statute, which enacts that the judge may inflict a sentence not exceeding seven years; so that though there could be twenty counts on twenty different offences, each deserving of seven years' penal servitude, still he could only have penal servitude for seven years. For this, however, no authority was cited except the American case, which is contrary to all our authorities, and shows that the judges did not understand the practice of our law. What would be the consequences if such were the law? Suppose a man were to commit two offences, each of which deserved penal servitude for seven years, how is he to be dealt with? Is the Crown to wait until he has suffered his sentence for the first before prosecuting him for the second? That is preposterous. Or is the Crown to prosecute him upon two separate indictments, and is judgment to be respited on the second until the sentence has been suffered under the first? Or is not the Crown to take the reasonable and convenient course of prosecuting him by one indictment on two counts and sentencing him on both? Why should it be that being found guilty on one or two counts, of two offences, he should be punished only for one? It is utterly unreasonable. I am of opinion that it is not so either in law or reason, and that all the authorities are opposed to it, and that consequently the judgment must be affirmed.

BRETT, L.J.—The argument for the prisoner made so little impression upon me that I was quite prepared at its close to pronounce judgment for the Crown. It is remarkable that these objections were never brought forward before during the six years that have elapsed since the trial, and that they are now brought forward for the first time. As to the objection that the sentence of penal servitude ought to have been by way of addition to one of imprisonment, here it would not be material, for it might be amended under the statute; but I am of opinion that the enactment is only enabling, and that while it gives the judge the power of imposing imprisonment as well as penal servitude, yet there is no obligation to do so. It is only if imprisonment is adjudged that penal servitude is to be additional, and it may be in substitution for it. It has been said that on the trial of two other persons for perjury (a) I imposed a sentence of imprisonment preliminary to the sentence of penal servitude; but that was I have no doubt only as a precaution, and not on any particular construction of the statute, and I am clearly of opinion that there is nothing in the objection. Then as to the main objection, it was argued that there were not really two offences, but only one. It is unnecessary to consider whether there can be two perjuries on the same oath, for here there are two counts on two oaths taken before different tribunals and on different occasions. It is impossible to say that on such a

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(a) *Reg. v. Luie*, and *Reg. v. Brown*.

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case there are not separate perjuries and two offences. It was urged that if they are put into one indictment they are to be treated as one offence, and that the rule in *Wilkes' case* only applied to cases of different indictments—that is, that separate counts, charging several offences, are not equivalent to several indictments. But during the last three centuries the contrary has been held, that where separate offences are charged in the same indictment they are equivalent to separate indictments. It was said that they could not be joined in felony, but they can be joined, and it is not an objection on writ of error. Then it was said that the sentence could not be inflicted under the statute, because the indictment did not end *contra formam statuti*; but the sentence is not part of the indictment which states only the offence. Then on an indictment containing more than one count, can the punishment on one of them be postponed until the expiration of the punishment on the other? That seems to have been decided in *Wilkes' case* and other cases that have been cited. The judges in *Wilkes' case* were asked whether a judgment of imprisonment, to commence after the termination of an imprisonment to which he is already subjected, is good in law, a question which, it will be observed, had no reference to whether there was one indictment or two, but was quite general in its terms, and the judges answered it in terms quite as general, for their answer was “that a judgment of imprisonment against a defendant may commence after the expiration of an imprisonment to which he has been before sentenced for another offence.” Ever since then that has been taken to be the law, and that quite irrespective of the question whether the charges are in one indictment or two. Not only was that the answer of the judges, but it has been so interpreted ever since. It is not a question of “cumulative” punishments—the use of that expression is incorrect. It is not so put in the answer of the judges in the case of *Wilkes*. The question was, whether the operation of a sentence could be postponed until after the expiration of a previous sentence. The judges gave indeed one limitation; they limited the postponement of the second sentence to the case of another sentence in existence up to the time to which the second is postponed—that is, that the second sentence must take effect before the final dismissal of the party, but that, with that limitation, it may be postponed. The cases of *Robinson* and *Gregory* are to the same effect. There are, therefore, authorities to show that it may be done, either on one indictment or several. Then as to the objection that the aggregate of the punishments must not exceed the maximum, the statute of 7 & 8 Geo. 4 gave the power in cases of felony, and the proper inference from that is that it was not required in cases of misdemeanour. It was passed long after the case of *Wilkes*, and I should infer that the Legislature thought the law was already settled by that case as to misdemeanour. In support of that view there is the dictum of Blackburn, J. in the case of *Cutbush* (*ubi sup.*) that the law was



so already in cases of misdemeanour. The statute expressly authorises cumulative sentences, even exceeding the maximum, and it affords a strong argument against the present contention. As to the American case, I was anxious to ascertain on what ground or reason it rested. The proposition is that if a sentence for one of several offences may commence at the expiration of the punishment for another, the two together shall not exceed the maximum punishment for either. There is no reason, however, given for the proposition. The statute in the present case provides that the judge before whom any person is convicted of perjury, may sentence him to penal servitude for seven years—that is, for any perjury for which he is convicted, so that if there are two perjuries he can be sentenced to seven years' penal servitude for each. I declare I can discover no reason why it should not be, and therefore, on the whole, I concur in the opinion that the case is clear, and that there is no error in this record, and that consequently the judgment must be affirmed.

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*Judgment affirmed.*

## COURT OF CRIMINAL APPEAL

*Saturday, May 1.*

(Before KELLY, C.B., LUSH, DENMAN, LOPES, and BOWEN, JJ.)

REG. v. ROADLEY. (a)

*Indecent assault—Child of tender years—Consent—Direction to jury—Practice.*

*On the trial of an indictment for an indecent assault upon a little girl only seven years of age, the child was examined as a witness. The prisoner's counsel proposed to address the jury on the consent of the child to the assault. The Chairman refused to allow him to do so, ruling that a child of seven years old might submit, but could not give consent to the assault. The prisoner was convicted.*

*Held, that the conviction must be quashed.*

AT the Easter General Quarter Sessions of the Peace for the county of Leicester held on the 6th day of April 1880, in the castle of Leicester, in and for the said county, the following case

(a) Reported by J. THOMPSON, Esq., Barrister-at-Law.



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was reserved for the opinion of the High Court of Justice by Sir Henry St. John Halford, Bart., deputy-chairman of the said county.

Edward Roadley (aged twenty) was indicted for assaulting Sarah Ann Burton, a child of seven years old.

According to the evidence given at the trial, the mother of the child noticing that she had a discharge from her private parts, took her to a surgeon for advice, who treated the case as one of gonorrhœa.

In consequence of this, inquiries were made, and the child stated at the trial that she and another child of a like age had been accustomed to ride with the prisoner in his milk cart, and that on one occasion she and the prisoner got out of the cart and went into a yard, that there the prisoner undid his trousers, and lifted up her clothes, putting his private parts against her own.

The prisoner, on being examined by a surgeon, was found to be diseased, and in such a state that contact with his person might have infected the child in the manner described by the surgeon. There was no sign of penetration or of violence.

The prisoner was defended by counsel, who proposed to address the jury on the question of the child's consent to the prisoner's act.

The Chairman, however, refused to allow the question of consent to be put to the jury, ruling that a child of seven years old might submit, but is incapable of giving consent in such a case.

The prisoner was convicted, and sentenced to twelve months' imprisonment, with hard labour. He is now undergoing his sentence.

The question reserved for the Court is the correctness or otherwise of the chairman's ruling in the case.

H. ST. JOHN HALFORD.

*Hensman* appeared for the prisoner.

*Prosser* for the prosecution.

DENMAN, J.—Is not this case concluded by the decision of this Court in *Reg. v. Read and others* (1 Den. C. Cas. 377; 3 Cox C. Cas. 266) ?

LUSH, J.—The ruling of the chairman cannot be supported.

By the COURT:

*Conviction quashed. (a)*

(a) In *Reg. v. Read and others* the assault was upon a girl nine years old, and the jury found a verdict of "Guilty, the child being an assenting party, but that from her tender years she did not know what she was about." This was obviously an imperfect verdict, and upon the argument of the case there was much interlocutory discussion as to the meaning of the verdict. Alderson, B. said: "The jury mean that she was an actual consenting party, but that she could not by law consent because of her tender years." Coleridge, J. said: "Here it is stated that there was a connection, and that the girl consented. They say that she gave all the consent to it that so young a person could give." Lord Denman, C.J.: "The jury have found that the girl gave her assent; we cannot tell whether this were really so or not, but

We must take the verdict as we find it. Very possibly the jury would have been warranted in finding the prisoners guilty generally. But it has been solemnly decided that, if the girl assents, the act is not an assault. The case is not stated satisfactorily. We are asked to determine whether this girl 'actually did give such assent as to invalidate the conviction.' How can we determine that? It was one of the questions for the jury." In *Reg. v. Johnson* (L. & C. 682; 10 Cox Cr. Cas. 114), where the jury returned a verdict of guilty, but stated that the girl consented to the indecent assault, the conviction was quashed. But in *Reg. v. Lock* (L. Rep. 2 Cr. Cas. Res. 10; 12 Cox Cr. Cas. 244), where the prisoner was indicted for indecently assaulting two boys, the jury returned a verdict of guilty, stating that they did so being of opinion that the boys merely submitted to the act of the defendant not knowing the nature of such act. The verdict of guilty was upheld by this Court. Kelly, C.B. said: "The question is whether such an act as that of the prisoner done to a person who does not actively consent, but merely submits to the act under circumstances in which he cannot exercise his will either one way or the other does not, even in the absence of fraud, amount to an assault. I think it does. . . . Though there was submission on the part of the children, I do not think there was any consent, for they were so wholly ignorant of the nature of the act done as to be incapable of exercising their will one way or the other." Brett, J. said: "Still, if they had in fact consented to what was done, their ignorance of its immorality would not make it an assault. . . . The question left to the jury was in substance a direction that if the boys merely submitted to what was done (and if they merely did this, the prisoner must have known that it was so), it was an assault; but if there was consent, it was no assault. Now, if a child does merely submit to what is done to it by an adult, and the adult know this, that is an assault. The direction of the learned judge and the finding of the jury were therefore both right."

There does not seem to be any reported case in which the girl assaulted was so young, viz., seven years old, as in the present case (*Reg. v. Roadley*). The assault must be proved in every case to have been against the will of the child, and though in point of fact the child may be incapable of giving her consent, the presiding judge cannot withdraw the question of consent from the jury if raised; but if the jury consider the child incapable of giving consent, they may, as in *Reg. v. Lock*, find the prisoner guilty.

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### HIGH COURT OF JUSTICE

#### EXCHEQUER DIVISION.

*February 12, 1880.*

(Before FITZGERALD and DOWSE, BB.)

COUNTESS OF KINGSTON AND ANOTHER v. O'NEILL.

*Trespass in pursuit of game—27 & 28 Vict. c. 67—Evidence necessary to sustain conviction.*

*A person trespassing on the lands of another, having with him greyhounds and beating bushes where hares were wont to frequent, should not on evidence of those facts alone, be convicted under the provisions of 27 & 28 Vict. c. 67, of trespass in pursuit of game.*

CASE stated by magistrates at petty sessions for the opinion of the Court.

The facts as appeared in the case were as follows:—The defendant, with greyhounds, was found on the lands of the complainants, by caretakers of the estate beating for hares as the witnesses believed. He was summoned for that he did, on Sunday, the 19th of October, 1879, at Gurrane, in the county Cork, unlawfully enter upon the lands of complainants, and with greyhounds and other dogs trespass in the pursuit of game.

Witnesses for the defendant alleged that he was only beating for rabbits. Certain objections were raised by the defendant in the Court below. First, That the summons did not disclose a legal offence under the 27 & 28 Vict. c. 67; secondly, that there was no evidence of the title of the complainants as landlords to the lands trespassed on, beyond the receipt by them from the tenant of the rent reserved under the lease of the lands, which it was alleged was not sufficient; thirdly, it was objected that as the 27 & 28 Vict. c. 67, was a penal statute, it should be strictly read, and that the reservation of the game to the complainants in the lease was insufficient to give them a right to sue under the said Act as constructive occupiers, because the said reservation clause did not contain the word "exclusively," or any other words equivalent thereto, so as to vest the sole right in the game in them. And also that the subsequent clause in the said lease,

(a) Reported by ORIEL R. ROOPE, Esq., Barrister-at-Law.

reserving a limited right of entry on the lands to the lessor for the purpose of hunting, &c., was a qualification of the previous clause reserving all the property in the game to the lessor, and left the occupying tenant still having a concurrent interest therein.

The magistrates overruled these objections, and convicted the defendant of trespass in pursuit of game, and fined him 40s., or in default one month's imprisonment.

*Shannon*, for the appellant, objected that in addition to the objections taken below, there was no evidence of any offence within the statute: (*Read v. Phelps*, 15 East, 271; *Rex v. Grice*, 7 Car. & P. 803; *Reg. v. Merry*, 2 Cox C. C. 240.

*Munro*, Q.C. and *Drummond*, *contra*.—This objection was not made below. The Court cannot entertain it, but can only decide questions of law arising on the facts as stated by the justices: (*Knight v. Halliwell*, L. Rep. 9 Q. B. 412.)

FITZGERALD, B.—Upon the trial of this case before the magistrates three objections were taken on behalf of the defendant. The first was that the summons which alleged that the defendant had trespassed on the lands of the complainant in pursuit of game, did not show any offence under the statute of 27 & 28 Vict. c. 67. The two others were, that there was no evidence of two other matters necessary to constitute the offence under the statute. The first and third objections were not insisted on in the argument before us. It was, however, insisted on that there was no evidence of the facts alleged to have been committed by the summons, which facts were, no doubt, necessary, to constitute the offence, the first objection being that alone they were not sufficient. It was insisted on by the counsel for the complainants that this objection was not taken before the magistrates, and in form it certainly was not taken; but we have only to consider whether the question involved in it is reserved for us by the case stated, and of that I have no doubt. There can be no doubt that the case purports to state the whole evidence before the magistrates, it states three conclusions to which they had come on that evidence. The first is, that the facts (being those which are stated in the summons) that the defendant trespassed on the lands of the complainants in pursuit of game were proved, the other two being that there was sufficient evidence of the matters mentioned in the second and third objections. And it then in effect reserves for us the question whether they were right in coming to these conclusions. I am of opinion that they were wrong in concluding that there was legal evidence of the defendant being on the complainant's land in pursuit of game. There was clear evidence that he was on the land of the complainants as a trespasser. The only other evidence on this head was that hares had frequently been seen on the lands; that when the defendant was seen on the lands he had two greyhounds (which are no doubt proper animals for pursuing hares) with him, and that when he was spoken to by the complainant's caretaker, he and some men

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who accompanied him went away without giving any answer. No evidence was given of any other act done by him or by the greyhounds. I am of opinion that there was no legal evidence of the intent to search for or pursue game, however I may suspect, or even believe, as the caretaker did, that the defendant came there for that purpose. I think, therefore, the conviction was wrong.

DOWSE, B.—There is only one point in this case upon which we are obliged to express an opinion. I am inclined to think that Mr. Shannon's argument is not well founded upon the other points, but I do not wish to be understood as giving any opinion upon them. I agree there was no evidence upon which a conviction could be properly had. I treat this case as if I were trying it with a jury. When a judge is assisted by a jury, it is often difficult for him to draw a distinction between what is sufficient evidence and what is not, but he is forced to come to some conclusion, and when the facts proved are as consistent with the innocence as with the guilt of the accused, the party on trial is entitled to be acquitted. In civil proceedings the judge should not send the case to the jury unless there is evidence from which they may legitimately draw the inference which the plaintiff asks to have drawn. If I were trying this man for penalties I would hold there was no evidence proper to be submitted to a jury. My suspicions regarding his guilt are very strong, but a jury are not entitled to act on mere suspicion or belief; they must act on evidence. The words of the 27 & 28 Vict. c. 67, s. 1, are "That any person who shall enter or be upon the said land in search of or in pursuit of game without the consent of such landlord or lessor, shall be deemed a trespasser." For my present purpose, I take no distinction between the words in search of and in pursuit of game. The evidence is, he was on the lands with greyhounds. A witness says he believes the defendant was beating for hares. There is nothing in this or anything else proved beyond suspicion, which should not be acted on in a court of law. I believe nobody would think of acting on it in any other case except the case of an alleged trespass in pursuit of game. In these cases it is said the man was there with greyhounds, and what else was he doing than looking for game? My answer is, I do not know, whatever I may suspect. It is of the utmost importance in all cases to proceed on well settled principles of law, and not to give more protection to hares and other *feræ naturæ* than is given to horses, cows, and other domesticated animals. There is nothing unlawful in having a greyhound even on a Sunday, and a greyhound can catch rabbits as well as hares, and it is conceded that rabbits are not game. If the prosecutor had waited he might have caught the defendant doing something, but as matters stand it is all speculation; and a defendant cannot be convicted on speculation without any evidence of an unequivocal act.

*Conviction quashed without costs.*

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### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

Nov. 4 and 11, 1880.

(Before MAY, C.J., O'BRIEN and FITZGERALD, JJ.)

ROBERTSON v. MACDONAGH. (a)

*Fee paid to barrister to defend a prisoner in a criminal case—*

*Neglect of barrister to appear at trial—Special contract.*

*A statement of claim for damages set forth that the plaintiff, being returned for trial on a criminal charge, entered into a special contract with the defendant, who was a barrister and Queen's counsel, to defend him at the trial, and attend on each day of the plaintiff's trial, and the defendant was paid a special fee, larger than the ordinary fee, or honorarium, paid to counsel for so attending, yet that the defendant neglected to attend the trial after the first day of the trial, by reason whereof the plaintiff was convicted, and suffered damage; on demurrer it was held that the claim was bad, as no valid contract can be entered into between counsel and client.*

**T**HIS was a demurrer to a statement of claim, claiming 10,000*l.* damages, against the defendant, who was a barrister and Queen's counsel practising at the Irish bar. The plaintiff was a carrier of goods carrying on his trade at Bachelors' Walk, in the City of Dublin, but at present confined as a prisoner for a term unexpired of eighteen months, pronounced against him on a charge of conspiracy at the Commission of Oyer and Terminer held in June, 1880, in Dublin. The plaintiff claimed damages for breach of contract under the following circumstances: The plaintiff was returned for trial by certain magistrates having jurisdiction in that behalf on a certain criminal charge to be heard at the Commission of Oyer and Terminer, to be holden at Green-street in Dublin on the 8th day of June, 1880, which trial subsequently and at the said sitting came on to be heard upon the 14th, 15th, and 16th days of June, and ended in a verdict against the plaintiff. A special contract was entered into by the

(a) Reported by CECIL R. ROCHE, Esq., Barrister-at-Law.



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defendant with plaintiff to attend as counsel for the plaintiff throughout the trial on receiving a special fee on his brief of fifty guineas and refreshers of twenty-five guineas, and consultation fees of five guineas. But the defendant refused to attend on the second or any subsequent day. The defendant demurred to this statement of claim. The statement of claim is sufficiently set forth in the judgment of the Court.

*Bewley* (with him *Walker*, Q.C.) in support of the demurrer.—The relation of counsel and client renders the parties mutually incapable of making a contract of hiring and service concerning advocacy in litigation: (*Kennedy v. Broun*, 13 C. B. N. S. 677.) In this case all the authorities are collected on this point. They cited *Swinfen v. Lord Ohelmsford* (5 H. & N. 890). In *Turner v. Philipps* (1 Peake N. P. C. 122), an action having been brought to recover back a fee for the non-attendance of counsel, Lord Kenyon recommended the parties to settle, on the ground that the fee was a gratuity, and his advice was adopted. Blackstone, in 3 Comm. 28, says: "It is established with us that a counsel can maintain no action for his fees, which are given not as *locatio vel conductio*, but as *quiddam honorarium*, not as a salary or hire, but as a mere gratuity which a counsellor cannot demand without doing wrong to his reputation, as is also laid down with regard to advocates at civil law." In support of this proposition, he refers to Sir John Davy's Reports Preface: (*Mingay v. Hammond*, Cro. Jac. 482; *Mostyn v. Mostyn*, L. Rep. 5 Ch. App. 457.)

*Philipp Keogh* (with him *Porter*, Q.C.) *contra*, in support of the pleading demurred to.—Although, as a general rule, an action does not lie against a counsel for not performing services, yet this is different in case of a special contract: (*Hobart v. Butler*, 9 Ir. C. L. R. 157; *Veitch v. Russell*, 1 Car. & M. 362, and 3 Q. B. 928.) This distinguishes this case from *Kennedy v. Broun*, and that class of cases including *Mulligan v. M'Donagh* (5 Ir. Jur. N. S. 101) against the same defendant as in the present case. Besides, in this case the relation was between an advocate and a person under a criminal charge. This relation is stronger than that of an ordinary client and barrister, and imposes a greater obligation on the advocate to attend to the interests of the client.

*Our. adv. vult.*

MAY, C.J.—The action in this case is brought for breach of contract. The defendant is an eminent Queen's counsel of the Irish bar. The 6th paragraph of the statement of claim states that the plaintiff was returned for trial on a criminal charge at the Commission of Oyer and Terminer, to be held in Green-street, in Dublin, which trial was accordingly held on the 14th, 15th, and 16th days of June, 1880, and resulted in the conviction of the plaintiff. The 7th paragraph of the statement of claim is as follows: "The plaintiff, by a special and express contract with

the defendant, agreed that if the defendant would promise and agree to attend and assist, with the aid of two other counsel, in the defence of the plaintiff upon and during the continuance of the said trial, he would pay to the defendant, instead of an ordinary honorarium or fee, a special fee to be named by the defendant; and the defendant thereupon agreed with the plaintiff that if he the defendant should be paid as a special fee, instead of an honorarium or ordinary fee, a sum of 50 guineas with his brief, and that if he should be paid a sum of 25 guineas for each day after the first day of the trial, during which, or any part of which, it should continue at hearing, by way of refresher, instead of the usual or accustomed honorarium or fee of 2 guineas, and that if he should be paid a sum of 5*l.* 5*s.* instead of the usual or accustomed honorarium of 2*l.* 2*s.* for his attendance and advice upon said consultation prior to or during the said trial with the said other counsel as he the defendant should direct and require, he the defendant would attend throughout said trial with all due and reasonable diligence, and without wilful or unreasonable absence, to defend the plaintiff throughout the said trial, and the plaintiff thereupon, and upon the faith of the said promise, paid to the defendant 52*l.* 10*s.* on his brief, and delivered his brief to him, and the defendant, on the said terms, received the said brief, and accepted the said money, and the plaintiff, in further pursuance of the said agreement, paid to the defendant, and the defendant accepted from the plaintiff, three several sums of 5*l.* 5*s.* for three consultations which were directed by the defendant to be held with the said other counsel, and which were the only consultations by him directed to be held, and the said sums were accepted by the defendant under the terms and in pursuance of the said contract, and the plaintiff says that the said trial commenced during the said sittings upon the 14th day of June last, and continued as above mentioned upon the 15th and 16th days of June last. And the plaintiff says that, although all things were done, all times elapsed and conditions were fulfilled necessary to entitle the plaintiff to have the said agreement fulfilled by the defendant, and although the defendant was offered and tendered the said special sum named by him of 25 guineas to attend upon the second day of the said trial, yet the defendant refused to attend upon the second day or any subsequent day of the trial without any reasonable cause in that behalf, whereby the plaintiff was greatly injured." The 8th is substantially to the same effect, omitting the statement as to the consultation fee, and as to the amount of the fees being named by the defendant, and also the statement that the defendant refused to appear on the second day of the trial "without reasonable cause." To these paragraphs the defendant has demurred generally. For the purposes of the argument, it must be assumed that the defendant did enter into the agreement mentioned in the 7th paragraph, and also that in breach of such agreement he declined to appear for the plaintiff on the second

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special  
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day of the trial without reasonable cause for so refusing. The contract in fact and the breach being thus admitted, the defendant nevertheless contends that the 7th paragraph of the statement of claim discloses no valid cause of action against him, inasmuch as it appears that the contract alleged was for service to be rendered by the defendant, as the advocate of the plaintiff in a court of justice. The plaintiff's counsel admitted, as they necessarily were obliged to admit, that in an ordinary case arising between client and counsel, the counsel could not maintain an action against his client, for remuneration for his services as an advocate, nor, on the other hand, could a client sue his counsel for the non-performance of his duties as advocate, or for negligence in the performance of such duties. But they contend that the case disclosed by the 7th paragraph was an exceptional case not falling within the general rule of law, it being therein stated there was a special and express agreement between the plaintiff and defendant, that the latter should name his own fee, that such fee should be a special fee in lieu of an ordinary honorarium or fee, and also that he should receive certain special fees for refreshers and consultations exceeding the ordinary fees, and that the defendant, in consideration of the premises agreed to attend throughout the trial without unreasonable absence; and the plaintiff's counsel relied on certain passages in the judgment of the late Chief Baron Pigott in *Hobart v. Butler* and other dicta to a similar effect found in the reports. The whole doctrine on this subject, and all the authorities to be found bearing upon it, either in the civil law or in English law, were elaborately discussed in the celebrated case of *Kennedy v. Broun*, reported 13 C. B., N. S. 677, and in which an able and exhaustive judgment was pronounced by Erle, C.J. The facts of that case were not identical with those of the present case. But the principles laid down by the Court were of general application. The Chief Justice says, at page 727: "We consider that a promise by a client to pay money to a counsel for his advocacy, whether made before, during, or after the litigation had no binding effect, and furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation." For authority in support of these propositions, we place reliance on the fact that in all the records of our law, from the earliest time until now, there is no trace whatever either that an advocate has ever maintained a suit against his client for his fees in litigation, nor a client against an advocate for breach of contract to advocate." The Court then proceeded to review all the authorities, including the passages and dicta referred to by the plaintiff's counsel in the present case, but, as the result of such examination, came to the conclusion stated in the commencement of the judgment, concluding by a very eloquent and admirable exposition of the duties and the position of an advocate, showing how inconsistent with a due discharge of such duties and with

the integrity and dignity of an advocate would be the existence of any contract of hiring to be entered into by him with his client. We conceive that the true principle governing cases of this nature is laid down in that case, namely, an advocate and his client are legally mutually incapable of entering into contracts of hiring with respect to advocacy in litigation, and that this incapacity is reciprocal: no legal contract existing between the parties, neither can sue the other for breach of its supposed terms. Whether the advocate sues the client, as in *Kennedy v. Broun*, for non-payment of the promised fee, or the client sues the advocate for the non-performance of the promised advocacy, the same principle applies, and neither can succeed. The Court of Common Pleas, in the case referred to, considered that no distinction was created by an express or specific contract or agreement between the parties, the principle laid down being absolute, and completely excluding any contract either express or implied between the parties. We entirely concur in that view. The rule we consider an absolute rule, and that it is wholly immaterial whether the fee or honorarium was named by the counsel or the client, or whether the duties were to be performed in an ordinary or an exceptional court. No contract in point of law can exist between the parties under the circumstances disclosed in the present case, and therefore the demurrer to the seventh count must be allowed. It follows *à fortiori* that the demurrer taken to the 8th paragraph, which is the same as the 7th, except that it omits some special circumstances alleged in the 7th paragraph, should also be allowed.

*Judgment for defendant.*

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## Ireland.

### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

*November 29 and December 4, 1880.*

(Before MAY, C.J., O'BRIEN, FITZGERALD, and BARRY, JJ.)

REG. AT THE PROSECUTION OF THE RIGHT HON. HUGH LAW, HER  
MAJESTY'S ATTORNEY GENERAL IN IRELAND, *v.* CHARLES STEWART  
PARNELL, M.P., AND OTHERS. (a)

*Attachment—Hostile criticism in public newspapers on conduct of persons against whom a criminal information for conspiracy was pending—Persistence of accused persons in the agitation for which the informations had been exhibited—Matters of public interest—Costs of motion for attachment.*

*Informations for conspiracy having been exhibited against certain persons in exciting tenants not to pay rent, and inciting persons not to deal with tenants who had paid rents, and divers similar offences, a public newspaper commented on the conduct of the traversers and their party, in keeping up the agitation which formed the subject-matter of the accusation against them, by such means as public meetings, speeches, &c. On motion for attachment against the proprietors of the newspaper in question, it was held that an attachment should issue to prevent the newspaper from criticising the conduct of the traversers, but costs were refused (dissentiente O'Brien J.) on the ground of the conduct of traversers having given provocation by reason of their persisting in the agitation of which they had been accused.*

**I**N this case informations had been exhibited by the Attorney-General against Charles Stewart Parnell, M.P., Patrick Egan, and several other persons for conspiracy in inducing tenants not to pay rent, and in inducing other persons not to deal with, or have any communication with tenants who paid their rents, and several similar offences. This was a motion for an order that a writ of attachment do forthwith issue to attach James P. Maunsell and George Tickell, proprietors of the *Dublin Evening Mail*, and the printer and publisher of that journal for contempt of court in printing and publishing in the following copies of the *Dublin*

(a) Reported by CECIL R. ROOPE, Esq., Barrister-at-Law.

*Evening Mail*, viz., that of the 3rd, the 4th, the 6th, the 15th, and the 18th day of November, 1880, respectively, articles and letters calculated to prejudice, prevent, and interfere with the fair trial of this information, and also to influence the jurors, who in all likelihood would be empanelled to try this cause, and also to prejudice the case of the defendants before their defence should be stated or put forward.

The facts of the case, as appeared from the affidavits, were as follows: The *Dublin Evening Mail* is an evening newspaper, circulating in Dublin, and to a great extent amongst the jurors who will have to try the information. It is a journal which advocates what is known as the landlord interest in Ireland, and five of the defendants are Members of Parliament, who are known to advocate considerable changes in the law of landlord and tenant in Ireland, which changes many landlords in Ireland are alleged to consider to be calculated to injure their interests. The articles complained of were all published subsequent to the filing of the informations. The first, which was published on November 3rd, was as follows, the heading of the article being "The Prosecutions":

What the traversers in the forthcoming State trials are charged with is, that they seek to effect their objects by unlawful and unallowable means, by means which involve cruel sufferings on the part of their fellow citizens, and remove the securities of life and property. Mr. Parnell and his fellow traversers would be quite within their right if they recommended the Irish tenants to form themselves into organizations, not to take or keep farms too highly rented. Such associations would be as legal as teetotal societies. The landlords might suffer in one case, as the publicans, distillers, and brewers do in the other; but they would not have to complain of physical compulsion or terrorism. These are the agencies which the traversers are accused of having concerted to bring to bear upon their fellow-citizens, and it will be for the jury and the administrators of the law to decide, in the first place, whether they did so, and in the second place, whether, having done so, they have incurred the penalties of conspiracy. The trials may end in a disagreement of the jury, or a verdict contrary to the evidence may be given, owing to intimidation; but the ample discussion which the case will receive at the hands of both counsel and judges can hardly fail to clear the public mind of a good deal of the nebosity and confusion in which the subject is at present involved. Another question on which needful light will be thrown is, how far Ireland is fit for constitutional government. Liberal orators are never tired of insisting on the differences which exist between Celts and Saxons, between Irishmen and their English and Scotch fellow subjects; and using these differences as reasons for the application of special legislation to this country. Mr. Joseph Cowen, M.P., went so far the other day as to hint, on these grounds, that a tribal tenure of lands would be more appropriate to Ireland than the system of free contract which has been imported from England. If this be really so, it is evident that our claim to such an institution as the Habeas Corpus Act is seriously impaired. The same differences that invalidate the British tenure of lands serves also to invalidate our right to the Englishman's best security for his personal freedom. The trials may show that the average Irish tenant can be terrorised into acquiescence in a system of fraud and robbery, of which he secretly disapproves, that in obedience to the threats of a handful of outsiders he will refuse the payment of rents which he is both able and willing to pay, and that in obedience to the same threats he may connive at agrarian outrages not excluding murder, and decline, by giving evidence of facts within his knowledge, to bring the perpetrators of these crimes to justice. The trials in fact will give much information concerning the amount of power which is wielded over the Irish peasantry by such organisations as the Land League, and the consequent necessity existing of reducing that power within tolerable limits. The present trials seek to effect this desirable reduction by punishing the alleged conspiracies. If this effort fail, and yet the public remain convinced of the reality, extent, and dangerous character of the conspiracy, the only remaining proposition will be to abridge the

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constitutional liberties of the people so as to get at the criminal agents of the conspirators. It is by no means certain that the Government can wait for the issue of the State trials to determine the question of the suspension of the *habeas corpus*, the trials will probably last over the winter, and crime cannot certainly be allowed free scope during that period. All will be depending on the Irish peasantry themselves. Another agrarian murder would precipitate the passing of a stringent Peace Preservation Act, or if Parliament could not conveniently be assembled for that purpose would compel the Government to assume the powers given by such an Act, and trust to the good sense of next session's Parliament for a bill of indemnity. Nor is the country disposed to endure much more of such comparatively minor crimes as the malicious burning of hay ricks, houghing of cattle, firing of shots into dwelling-houses, or the cruel and lawless carrying out of social interdicts of persons who transgress the Land League's orders. A very little more of this kind of thing will make the trials appear altogether too slow a remedy for our disturbed condition, equally will it indispose the Parliament to any immediate revision of the Irish Land Code or any serious attempt to facilitate the growth of a peasant proprietary or to diminish the evils produced by our cumbrous and expensive system of selling small parcels of land. As there may be room for useful legislation in these directions, we trust that no hindrance may be created by the lawless violence of any portion of the tenantry or by the operation of those agitators who thrive on the troubles of the country.

The article of the 4th day of November was as follows :

If we are rightly informed, says *The Freeman*, the Land League funds are not immediately accessible. Have they then been loaned in English or invested in American railways? Were they not subscribed for the purpose of being immediately available for the objects of the League, ready to be applied at a moment's notice for the restitution of the evicted tenant or the establishment of an *alibi* for an alleged assassin?

The article proceeded as follows :

The classes from which our merchants, shopkeepers, and professional men derive their incomes are themselves so impoverished that their expenditure has been cut down in a vast number of cases to the bare necessities of life, and debts long over due cannot be recovered without cruel and impolitic severity. The mischief, we need not say, is not confined to one creed or party, or even to any one rank of life: it pervades the body politic, it rankles in the vitals of the whole community. In full view of a business revival across the Channel, in view of an increased revenue in every department that gauges the prosperity of the people, customs, excise, stamps, post office, and telegrams, and last but not least, income tax, the Dublin citizen finds himself frustrated of his share in the general ease, his earnings and profits fished from him by the influence of a senseless and lawless agitation; he assists at a Tantalus feast, he is tied to an Ixion wheel for a Land League vulture to plunge his insatiate beak into his vitals. For all that he would endure the present disastrous state of things if he saw a prospect of the law being allowed to take its course, and the question between the interests of the poorest citizen and the interests of the agrarian brigand being fairly tried out to the end. But no such prospect presents itself. The Government is to be frightened out of its newly plucked up and still uncertain courage by a monster subscription, which will be paraded as a proof of the innocence, lawfulness, and perhaps beneficence of Mr. Parnell's propaganda.

The article of the 6th day of November contained the following passage. The heading being "The Green Terror :"—

Our correspondent's brief but graphic description of the Land League propagandists who have come under his personal observation tallies with all that is known of the same clan in other places, as they are known from the reports furnished of the Sunday agrarian meetings in the columns of the *Freeman* itself. They are, he says, lawless, thirsty souls, audacious to a degree, loud-tongued, full of menace; Bardolpha, Pistols, dishonest and grasping. *Alieni appetens sui profusus* is a good description of their moral character, for they look upon the goods of others as means to be devoted to their own special use. The above Latin phrase is taken from Sallust's description of Catiline, the greatest scoundrel produced in the most troubled period of the Roman Republic, and there is, in truth, a close resemblance between the movement instituted by that gentlemanly bandit, and the agitation organised, or at all events blown to its present dimensions, by Mr. Parnell.

The other articles complained of were in a similar style.

The affidavit of Mr. Tickell, the proprietor of the *Evening Mail*, stated that it was a matter of public notoriety that for a considerable time previous to and since the date of the publication of the said articles and letters an extensive agitation has been carried on throughout a large portion of Ireland, through the instrumentality of a society or organisation known as the Irish Land League. In the course of such agitation large public meetings had been held and speeches delivered thereat by the professed members of the Irish Land League, and many of such speeches have been of a very violent and minacious character, and reports of such meetings and speeches have been inserted in the public journals circulating in Ireland and England, and have been made the matter of vigorous and continuous comment, not only in the United Kingdom, but also in France, Italy, and the United States (the affidavit then referred to various articles published in the *Freeman's Journal*, and reports of meetings at which some of the traversers were reported to have made use of violent language.) The affidavit continued: "Previous to the publication of the said letters and articles, and since the institution of the prosecution herein, numerous reports of outrages and acts of violence of an agrarian character, and of an extensive system of terrorism and social disorganisation existing in a large part of Ireland, have been published in the public journals circulating as aforesaid; and it had been and was since the publication of said articles and letters, a matter of constant and serious discussion in the public journals throughout the kingdom whether it was sufficient to rely on the ordinary law and its remedies, or whether measures of an exceptional and coercive nature were not absolutely necessary to be resorted to by the Government of the country for the purpose of repressing such acts of violence and terrorism, and preserving where it still exists and restoring where it ceased to exist, order, and respect for law.

The affidavit proceeded to state that the articles had been written with a view of combatting these doctrines, and in answer to the speeches, and not with a view of influencing the jurors who would have to try the case.

*Macdonagh*, Q.C., with him *M'Loughlen*, Q.C., *Peter O'Brien*, Q.C., *Nolan*, and *L. Dillon*, for the traversers, relied on *Roach v. Hall* (2 Atkins); *Daw v. Eley* (L. Rep. 7 Eq. 49); *Tichborne v. Mostyn* (L. Rep. 7 Eq. 55.) The articles are such as are calculated to influence the class from which the jurors are drawn.

*Edward Gibson*, Q.C., with him *Monro*, Q.C., and *Gerrard*, *contra*, for the proprietors of the *Dublin Evening Mail*.—There is no dispute of the doctrine laid down in the cases cited on the other side, and followed in this country in *Macartney v. Corry* (Ir. R. 7 C. L. 245). But this is a peculiar case, the agitation which the prosecution is aimed at is of such extent that it spreads over the entire country, and it was persisted in after the prosecution commenced. Under these circumstances the newspapers

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opposed to the agitation are justified in commenting on it as a matter of great public concern. They relied on *Wason v. Walter* (L. Rep. 4 Q. B. 73.)

*Our. adv. vult.*

MAY, C.J.—In this case a motion has been made to attach the proprietor and other persons connected with the paper called the *Evening Mail* for contempt of court, such contempt consisting in the publication of certain articles so strong as to be calculated to prejudice the trial of the traversers in the approaching prosecutions. In the information in this case it is alleged that the traversers conspired to prevent the payment of rent, by operating upon the minds of the tenantry of the country—by menace, by threatening violence, and what we may call excommunication. Now, it is also alleged that they interfered with and interrupted the course of justice by preventing the execution of legal process. These are substantially the two heads of the information. Now, this application has been made, not on behalf of all the traversers, but on behalf of two of them—namely, Mr. Parnell, who may be regarded, I presume, as the head, and Mr. Egan, who may be regarded as the other extremity. He is the treasurer. He does not appear to have taken a very active position himself. His functions are rather of a passive character—to take care of the funds of the Land League. But, however, the application is made on behalf of these two, and these two only; and perhaps that may be accounted for by this, that Mr. Parnell appears himself shortly after the institution of these proceedings to have left Ireland, and, therefore, he was not so conspicuous as some other members of this society, which appears to be called the Land League. But I look upon that as a mere pretence. I look upon Mr. Parnell and Mr. Egan together as including between them the entire body of the traversers, and that this application is, in fact, made by all the traversers, and not on behalf of Mr. Parnell and Mr. Egan alone. I shall draw attention to some of the passages published in the *Mail*, and brought under our notice as objectionable. The first article is an article of the 3rd day of November. I do not intend to read the whole of these publications, but only a few passages which will tend to show what their general tendency and effect was:—

These are the agencies which the traversers are accused of having concerted to bring to bear upon their fellow citizens, and it will be for the jury and the administrators of the law to decide, in the first place, whether they did so; and in the second place, whether having done so, they have incurred the penalties of conspiracy. The trials may end in a disagreement of the jury, or a verdict contrary to the evidence may be given owing to intimidation; but the ample discussion which the case will receive at the hands of both counsel and judges can hardly fail to clear the public mind of a good deal of the nebosity and confusion in which the subject is at present involved.

I conceive the meaning of that passage is this—There may be a disagreement of the jury, or, if there is an acquittal, that acquittal would be directly contrary to the evidence and procured by intimidation. Now, I confess that it appears to me that that

paragraph is objectionable and calculated to prejudice the minds of the jurymen of Dublin, if they are told before the trial commences that an acquittal is not to be expected except by a verdict contrary to the evidence and procured by intimidation. That is, to comment by anticipation upon the evidence that was about to be given, and I think there can be no doubt that that passage as it stands is objectionable. In an article of the 4th day of November there is a passage—

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The classes from which our merchants, shopkeepers, and professional men derive their incomes, are themselves so impoverished that their expenditure has been cut down in a vast number of cases to the bare necessities of life, and debts long overdue cannot be collected without cruel and impolitic severity. The mischief, we need not say, is not confined to one creed or party, or even to any one rank in life. It pervades the body politic. It rankles in the vitals of the whole civic community. In full view of a business revival across the Channel; in view of an increased revenue in every department that gauges the prosperity of the people, customs, excise, stamps, post-office, and telegrams, and last, but not least, income tax, the Dublin citizen finds himself frustrated of his share in the general ease, his earnings and profits filched from him by the malign influence of senseless and lawless agitation.

The tendency of that passage is to inform the jurymen of Dublin that if they find that their trade and business is affected they must attribute that to the agitation that has taken place, and that agitation is imputed to the traversers. I think that passage, though not in the same degree or to the same extent as the previous passage to which I have adverted, is objectionable. Then there are several other passages which are not of a tendency so directly calculated to influence the jury—namely, the comparison of Mr. Parnell to Cataline; and also another very strong, and undoubtedly most unfair, expression, in which it is said that Mr. Parnell and his murdering gang commenced to teach the people revolution. Now that is, of course, violent and unjustifiable language, and it must necessarily have directly tended to prejudice the minds of the jurymen who may be called to sit upon this inquiry. These are the passages which have been relied upon. In answer to this application Mr. Tickell has made an affidavit in which he says :

I say it is a matter of notoriety that for a considerable time previous to and since the publication of the said articles and letters, an extensive agitation has been carried on throughout a large portion of Ireland through the instrumentality of a society or organisation known as the Irish Land League. In the course of such agitation large public meetings have been held and speeches delivered thereat by the professed members of the said Irish Land League, and many of such speeches have been of a very violent and minacious character, and reports of such meetings have been made the subject of vigorous comment not only in the United Kingdom, but in France, Germany, Italy, and the United States; (and he referred to the copies of the *Freeman's Journal*, of the 5th, 8th, 15th, 16th, 18th, 22nd, and 25th November.) Previous to the publication of the articles, and since the prosecutions, numerous reports of outrages and acts of violence of an agrarian character and of an extensive system of terrorism and social disorganisation, existing in a large part of Ireland, have been published in the public journals circulating as aforesaid. It was a matter of serious discussion whether it was sufficient to rely on the ordinary law and its remedies, or whether measures of an exceptionally coercive nature were not absolutely necessary to be resorted to by the Government of the country for repressing such acts of violence and terrorism.

Therefore, the case of the *Evening Mail* is this—since the commencement of “this prosecution a system of terror and outrage

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has prevailed in a large part of Ireland; meetings have been held over large portions of this country, at which speeches of a violent and minacious character have taken place, and it was in order to protest against that state of things, in order to draw the attention of Great Britain to this state of things, that these articles were written. Now let me just see for a moment what some of these speeches were. I do not propose to go through all these papers (producing a large number of newspapers). Here in the beginning, immediately after the institution of these proceedings, I find that it is reported—at least in an article of the *Freeman*—that there was a meeting in the city of Dublin of this Land League, at which Mr. Parnell of course presided, and at that meeting Mr. Parnell informed the Land League that he intended to return to his place in the country, and that if any peace-officer should appear there he would put him in the river, and a member of the Land League immediately said, “Give him some buckshot.” Now, Mr. Parnell may not have been serious when he said that, but it was extraordinary language for a member of Parliament to use, speaking of the execution of the process of the law by a peace-officer. Now here is an article or speech of a Mr. Dillon. He said: “The task now before them was this: let them pledge themselves, every man there, not to pay in the two counties—the county Clare and the county Tipperary—one halfpenny more than Griffith’s valuation. Let them get every man to join the Land League—let them send round young men, and ask every farmer to join them, and if any refused they would then know who were the friends of the people and who were their enemies. Then let each parish hold a meeting, and let a resolve be come to after consideration, and anyone who would break the pledge thus come to was to be regarded as a traitor to the people.” Recollect that the statement in the *Mail* was that these traversers by the means stated were endeavouring to make the tenants of Ireland fraudulently and dishonestly to break their solemn engagements, and here we have one of those traversers repeating that language publicly, exhorting the people to take the course I have read out pending the prosecution. Well, here is another passage. “If we are struck at and imprisoned, whom must we hold responsible for that imprisonment? We ought to hold responsible the landlords of Ireland, who have urged on the Government this insane course of coercion, and what will be our duty? Our plain duty and policy will be to inflict a punishment on the landlords of Ireland which will make them repent their course. The executive of the Land League will issue orders to the people probably, if this course is determined on, to strike some counterblow at the landlords, and it trusts and hopes the people will be prepared to obey.” What is the meaning of a counter stroke against the landlords? How would that be interpreted by the inflammable people to whom it will be addressed? and what is the meaning of this Land League avowing openly that this agitation is under their control—that they would issue



orders to the people, and of hoping that their behests will be obeyed? I do not wish to excite angry feelings in my own mind, and therefore I will not trust myself to go over the body of newspapers submitted to us. Now is it, or is it not, the duty of a public journalist to take notice of such proceedings as these? I say it was not only their lawful calling, but their bounden duty, to call the attention of the people of this empire to the state of things existing in this country. But that is not precisely the way in which the court can view this case. It is not a question here between party and party. Violent language on one side is not to be excused or justified by violent language on the other. Notwithstanding any violence of language used by those whom I cannot help regarding as the traversers, it would not justify by any means any newspaper in using language addressed to the jury who are to try the case—language calculated to influence their minds and prejudice the true administration of the solemn trust reposed in them. This is not a question between the traversers and the *Evening Mail*, but the question is how this Supreme Court of Judicature of the country is to deal with the matter from its own sense of what is just, right, and becoming. It is the duty of that court, wholly irrespective of any language used by any person, to take care that the pure stream of justice be not diverted or obstructed; and if it finds that this journal, which has been brought under its notice, has offended by using language addressed to the citizens of Dublin calculated to prejudice their minds, that language cannot be justified or excused by the fact that other persons have used still more objectionable language. The rule of the court is plain, and I may cite a passage from the judgment of Blackburn, J., in the case of *Skipworth* (L. Rep. 9 Q. B. 233), (the Lord Chief Justice read the passage in which it was laid down that to prejudice the trial was a contempt of court, and that what is called appealing to the public so as to prejudice the minds of the jury who might come to try the case, and perhaps deter them, was also to be so described). Therefore I say that we are not here on this occasion to try whether the statements in the *Mail* are true, or are false statements. If they be true, it by no means follows that therefore they should be brought before the mind of the jury in such a way as to influence this trial, but at the same time that we think these publications objectionable, and must be treated as such by this court, can we forget the provocation—the gross provocation—that has been given? I think it was the duty of every newspaper to draw attention to the state of the country, and these publications did so, but at the same time they should have cautiously abstained from saying a word that could possibly influence the minds of any jury appointed to try the case. The court will make the order for attachment absolute, because they think that these publications are to be deprecated. They will not give any costs in this proceeding.

FITZGERALD, J.—I concur in the decision which has just been

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pronounced, although probably if sitting alone and acting on my own judgment, I should have considered it more expedient to have pronounced no rule on the motion. I adopt the Lord Chief Justice's statement of the law and practice of the court, and of its authority to protect its suitors, and secure an unprejudiced and impartial trial and decision. The power of the court and its duty to exercise it when properly called into action was not questioned. The court, however, must in every case where it is called on to put in force its extraordinary powers, be satisfied that the offence alleged has been proved, and that the party setting it in motion is entitled to its interference and protection. If this was an ordinary cause, having no matter of public interest outside its limits, and with nothing to account for the incriminated articles save the cause itself, the court would have simply decided that some or one at least of those articles was calculated to create a prejudice against the defendants, and prevent a fair trial, and have awarded an attachment in ordinary course. I shall now state the reasons which would have induced me to say no rule. The case before us is so out of the common course that there can be no comparison between it and the cases which have been cited in the discussion, nor do they afford us a guide in the exercise of the authority of the court in the present extraordinary circumstances. In this prosecution the defendants are charged with a conspiracy to incite tenants not to pay their rents, and to deter others by threats of violence from paying their rents, to procure tenants lawfully evicted to re-enter by force, and to deter others from taking lands from which a tenant had been evicted, and also to deter parties from purchasing at sales under certain writs of *fiern facias* out of the High Court of Justice, or under decrees from the County Court. The defendants are or are alleged to be principal and active members of an association calling itself the National Land League, and I infer that it is largely for their acts and conduct in the Land League agitation that they are impeached. Pending this prosecution the Land League agitation continues with undiminished force. Monster meetings are held, exciting speeches are delivered and published, and events are daily taking place in many parts of the kingdom, arising out of the agitation affecting the public peace and safety, and in which public interests of the most vital character are concerned. The court must, under such circumstances, be very cautious that it does not by its act on this occasion interfere unnecessarily with and abridge the public right of free discussion of matters so largely involving the public interest. Although it is obvious that in treating these matters in the public press considerations must necessarily arise, and topics be suggested prejudicial to the defendants and to the calm trial of this cause; yet the court cannot and would not interfere with the public right unless it was satisfied that under cover and pretence of public discussion it was intended to prejudice the course of justice in the pending suit. This motion

has come before us in the names of two only of the defendants, but it has been obviously made on behalf of all. The application is to the judicial discretion of the court, and is in substance for protection of the defendants. The consideration then arises whether the course pursued by the defendants and their associates acting with them and in their interests since the institution of this prosecution, has been such as that the court ought not to put its summary powers in force at their instance, and for their benefit though it may be called on to vindicate its own authority. We cannot shut our eyes to what is daily passing; and, even without the aid of the documentary evidence before us, we cannot fail to see that, from the day on which this prosecution was commenced, a course has been persistently pursued, and continues to the present moment, which under the terms "fair trial," or "fair trial defence fund," or some other such terms, is calculated to excite public prejudice against the prosecution, and interfere with the fair trial of the cause. Manifestoes have been issued appealing to public passions—meetings have been and are daily held—speeches made, and letters written and published, with the apparent intent and design of creating public odium against the prosecution, and so prejudicing the public mind as seriously to diminish the chance of having a calm and impartial trial. The evidence before us shows clearly that several of the incriminated articles were produced by the course thus pursued by the Land League. Thus, for instance, immediately after the filing of the information the Land League issued a manifesto. I have not its exact date, but it is reprinted in the *Mail* of the 6th day of November, with a commentary on it, and the article headed "The Green Terror." The opening passages of the manifesto indicate its character. (His Lordship here read the opening passages of the manifesto given above.) The commentary of *The Mail* on this document is one of the articles of which the defendants complain. No one can read that manifesto without coming to the conclusion that it is calculated to prejudice the prosecution, and render very remote the hope of calmness and impartiality. The course subsequent to that manifesto has been such that, if brought formally before us, we might have been placed under the disagreeable necessity of attaching some of the defendants—many of the most active Land Leaguers, and not a few ecclesiastics, as well as the representatives of the press, who have published these matters. The Court, however, never acts for itself, and requires a prosecutor, and the Attorney-General has, happily for us, preferred the wiser policy of inaction. Having regard to the consideration that many of the articles are recriminatory, and provoked by the course thus pursued by the defendants or their associates, I should have preferred that the court should have marked their condemnation of that course by pronouncing no rule on the motion. The motion has been professedly instituted to protect the defendants from prejudice in the suit, but it has in

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that respect been unfortunate, as it has been the means of accumulating and presenting again to the public in a condensed form the very topics which it is alleged were intended to their prejudice. We hope, however, that, in the interests of justice, it may have one good result—that it may induce all parties, in the short interval that will elapse before the trial of this cause, to refrain from all appeals to passion and prejudice in relation to this suit, and from all commentary on it which can in any way or shape interfere with a calm, fair, and impartial decision on the true and real merits.

BARRY, J.—I shall merely add that, in concurring in the decision of the court, I base my judgment upon the article of the 4th, and in some degree on the article of the 3rd day of November. That article was published the second day after the *ex officio* information. It refers in express terms to the coming trials, and it is impossible not to see that the tendency of its language is to impress on the class from which the jury for the trial would be selected, that their own interests pointed to the conviction of the prisoners. In saying this, I am not to be understood as expressing a disbelief in the statement of Mr. Tickell that in the publication of the article he was not actuated by any such motive; but, as Mr. M'Loughlen rightly contended, the publisher in such cases is in point of law to be judged by the natural meaning and tendency of the publication, irrespective of the probable intention existing in the mind of the publisher. As regards the subsequent articles, I think they are open to different considerations, and in respect of them the case is one of peculiarity and novelty, and no authority has been cited to show that under similar circumstances the court would interfere by the summary power of attachment. This is not the ordinary case where a defendant is charged with an offence, or what is alleged to be an offence; the alleged acts or act constituting the alleged offences are completed and past, and nothing remains but the trial and its result. The proceedings are, so to say, self-contained. No public interest is involved beyond that which attaches in a greater or lesser degree to every question relating to the administration of the criminal law. No legitimate reason exists for the public discussion of the approaching trial beyond the gratification of idle speculation. If in such a case any newspaper is published containing matter calculated to prejudice the fair trial of the defendant, I think the undoubted jurisdiction of the court should be exercised with promptitude, vigour, and determination to stop such interference with the free and impartial administration of the law, and, if necessary, impose upon the offender an exemplary punishment. In such a case, when a defendant invokes the protection of the Court, the Court will not entertain by way of answer to his appeal any discussion upon the merits of the case for trial, nor its political or social importance, nor as to the truth of the prejudicial statements of which he complains. The sole question for the Court is, the character and tendency of the publication. Freedom of the

press, freedom of speech in public affairs are to be cherished and maintained, though they may sometimes be abused in the heated atmosphere of political conflict; but, when a matter is brought within the cognizance of the Court, impartiality of trial is, and I hope ever will be, the paramount consideration. But what is the state of things here? Long before the prosecution was instituted, a powerful political movement had been carried on, having for its object a fundamental alteration of the land laws and land system of the country. It is asserted, both by the friends and enemies of the movement, that no political movement has ever so thoroughly agitated and excited the public mind. The movement is carried on largely, if not altogether, through an organisation every day increasing, as we are told, in power and influence, called the Land League, of which the defendants who move for this attachment are prominent members. It has not been, it could not be denied that this agitation has given rise to a controversy, political and social, of unparalleled acrimony, and a conflict of one class with another of unprecedented importance. To demand that the newspaper writers and other publicists should not from their different points of view discuss fully and freely a situation of such public interest, would be simply to demand the surrender of their privileges and the abandonment of their duty. I may say it has been discussed all over the civilised world. It has necessarily led to the use of strong and often exaggerated language, fierce invective and vituperation. The result has been an excitement of the public mind of an intensity never surpassed if it has ever been equalled, and finally there has arisen in the country a state of things so grave that we are informed that it constitutes the reason why Parliament is summoned at a period of the year unusually early. It is in this state of things that this prosecution has been instituted. It is not, as in the case I have suggested, the culmination of the transaction under public discussion, it is a mere incident in the great controversy, and many persons on both sides have pronounced it an insignificant incident. Still, if the defendants who move for this attachment suspended or even withheld from the agitation, during the pending of the prosecution, I could perfectly understand their demanding that their trial should not be prejudiced by hostile criticism on what was past, but so far from suspending or withdrawing from the agitation it is carried on with unabated vigour, meetings are held, speeches are made, and all the machinery of the Land League is kept energetically at work. For us, then, to grant an attachment upon the articles other than those I have specified would be simply in effect to make an order that whilst the defendants and their organisation are to be at liberty to do, say, and publish whatever they think fit for the prosecution of their political purpose, no voice is to be raised, and no pen is to be wielded, on behalf of those who believe their most valued interests to be menaced and assailed. Such a proposition seems to me entirely unreasonable, and one that the Court could not accede to. I

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therefore, as I have said, in concurring with this decision, base my decision on the articles of the 3rd and 4th days of November. O'BRIEN, J., concurred, but was of opinion that costs should be granted.

*Order for attachment made absolute with costs. The attachment not to issue.*

## COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED.

*Saturday, November 20, 1880.*

(Before COCKBURN, C.J., DENMAN, MANISTY, STEPHEN, and WATKIN WILLIAMS, JJ.)

REG. v. DOWNER. (a)

*Evidence—Solicitor and client—Privileged communication.*

*A letter written by a solicitor for a client making a claim for a lost parcel alleged to contain valuable articles, is not inadmissible on the ground of privilege in a criminal case.*

*In order to make a client criminally responsible for a letter written by his solicitor it must be shown that the letter was written in pursuance of the instructions of the client.*

*A letter by a solicitor written "in consequence" of an interview with his client is not equivalent to a letter written by the instructions of his client, and is not admissible in a criminal case against the client.*

CASE reserved by the Chairman of the Second Court at the Hampshire Quarter Sessions.

The prisoner was tried before me upon an indictment for false pretences, containing two counts.

First count charged her with endeavouring to obtain by false pretences (which were duly set out) from Herbert Simmons, the manager of the Newport and Cowes Railway Company, the sum of 19l. 14s. 6d.

Second count charged the endeavour to be to obtain certain goods from the same person.

The facts proved were as follows :—

The prisoner was a traveller by a train on the railway on the 7th day of May in company with another person. She had with her a parcel wrapped up in paper. Both got out at one of the stations, and in the presence and hearing of the prisoner the other person (who was called as a witness) gave the parcel to the engine driver with directions to leave it at the railway refreshment room, and the parcel was so left in charge of a waitress

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



there, and was seen there by the person mentioned on the next day (8th May).

On the 10th day of May the prisoner called at the office of the railway station, and inquired of the clerk if a parcel had arrived for her, describing it by an old label, such as was in fact put upon her parcel. No such parcel being there, she called a second time the same day, and then stated to the clerk that the parcel contained a gold watch and chain worth 10*l.*, a silk dress (afterwards alleged by her to be worth 4*l.* 10*s.*), and other valuable articles.

On the part of the prosecution two gentlemen were then called who were in partnership as solicitors, and certain letters were shown to each of them, and these questions asked: "Did you have an interview on the 20th day of May with the prisoner?" Answer: "Yes." "Did you write this letter in consequence of that interview?"

Counsel for the defence objected to the question as against the rules of evidence relating to privileged communications between attorney and client. "I ruled that it was admissible." Answer: "Yes."

A piece of paper was handed to one of these witnesses, and the question asked, "Have you ever seen that piece of paper before?" Answer: "Yes."

"Where did you last see it?" Answer: "On my desk in my office."

"On what day?" Answer: "On the day on which I wrote the last letter shown to me."

"Whose handwriting is it in?" Answer: "My clerk's—he is my son."

The manager of the railway was then called and proved that he received three letters dated respectively the 20th, 24th, and 26th days of May, which letters were those proved to have been written by the solicitors mentioned, or one of them, and which it was then proposed should be read on the part of the prosecution.

Counsel for the defence objected that the letters were not written by the prisoner, nor seen by her after they were written, nor dictated nor adopted by her, and so were not admissible. Also that the letters being written by a solicitor after, and as a result of communication with his client, they were inadmissible as evidence against the client.

I held that the writers of the letters were proved to be the agents of and acting under instructions from the prisoner, and that although all communications to them were privileged as to them as witnesses, yet that the letters being produced by a third party to whom they were sent were admissible, the rule as to privilege of solicitors being, in my opinion, confined to their giving evidence as to communications made to them in their professional character.

The piece of paper proved to be in the handwriting of the solicitor's clerk was then produced by the manager of the railway,

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and he stated that it was inclosed in the letter from the solicitor of the 26th day of May. In that letter there was the following passage: "I inclose you a list of the principal contents, and must ask you to be good enough to make further inquiry into the matter. I mention that the brown paper in which the parcel was wrapped had somewhere the name or ticket of 'Golden and Vibert,' who are grocers at Newport, and from whose shop it came."

It was proposed by the prosecution to read this paper, which, in fact, was a list of valuable articles alleged by the prisoner to be in the lost parcel.

Counsel for the defence objected to its admissibility, but I ruled against the objection on the ground that it formed a part of the letter in which it was inclosed and in which reference was made to an inclosure.

Another ground for the admission of the list as evidence was that it was proved by the police sergant, who was witness in the case, to have been read over by him to the prisoner after saying to her, "Here is a list the railway people have received with the articles you say you've lost." To which she replied, "That is right what I have said there; but there is more than that."

Subsequently the prisoner stated to the police constable (under circumstances which rendered the evidence admissible) "That the articles mentioned in the list," naming them without reference to the list, "were never in the parcel."

The parcel delivered to the engine driver was obtained from the waitress at the refreshment room, and shown to the prisoner, who acknowledged it to be the one in question, and, being opened in her presence, she stated some articles of small value in it, old clothing, &c., were hers. The articles mentioned by her as being in it to the railway clerk, and to the policeman, and which were enumerated in the list mentioned, were not in it.

This being the case for the prosecution, counsel for the defence contended that there was no case for the jury on these grounds:—

1. No evidence on the first count of any attempt to obtain 19*l.* 14*s.* 6*d.*, or any other sum, because there was no evidence of any value.

2. No evidence on the second count of any attempt to defraud the company of the goods mentioned in that count, because those goods were never in their possession.

3. That the circumstances proved amounted only to an actionable wrong, and that no criminal fraud had been committed.

4. That no crime can be committed by substitution, and that in this case the claim on the company being made by a solicitor acting for his client no crime had been committed.

5. That there was no evidence of any attempt to defraud the person named in the indictment, viz., "Herbert Simmons, being manager of the Ryde and Newport Railway Company."

I ruled against all these objections, and must confess that I was unable to comprehend the fourth objection.

The jury convicted the prisoner.

At the urgent request of the counsel for the defence, I consented to reserve and to state a case for the opinion of the Court for Crown Cases Reserved, and discharged the prisoner on bail to come up for judgment hereafter.

(Signed) W. CLEMENT D. ESDAILE,  
Chairman of Second Court, Hants Quarter Sessions.

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No counsel appeared for the prisoner.

*O. Matthews* for the prosecution.

DENMAN, J.—Was the letter admissible in evidence? The question put is this, “Did you write this letter in consequence of that interview?” The proper question to put was, “Did you write this letter in pursuance of the instruction of the prisoner.” It is not like a civil case, in which every letter written by a solicitor is evidence against his client; but this is a criminal case, which makes a difference. Knowing how inaccurate solicitors sometimes are in making claims for compensation on behalf of clients, the client cannot in a criminal case be made responsible unless it is proved that the letter making the claim is written in pursuance of the instructions of the client.

*C. Matthews*.—I did put the question in the first instance in this form: “Was the letter written by the direction of the prisoner?” but that question was objected to, and the Chairman ruled it to be inadmissible, on the ground of privilege; I then had to shape the question as best I could. In one of the letters there was a slip of paper containing a list of articles alleged to have been contained in the parcel. This list was admitted by the prisoner, when read over to her by the police sergeant, to be correct.

COCKBURN, C.J.—That does not make the statement of her solicitor in the letter admissible. To make her responsible, you must show that he had authority to write the letter.

STEPHEN, J.—The admission to the serjeant was an adoption by her of the list of articles, but not of the letter.

*O. Matthews*.—Her conduct and admissions showed that the solicitor was acting under her directions.

COCKBURN, C.J.—I am of opinion that the conviction cannot be upheld. A piece of evidence was received which was not admissible; viz., a letter written by the solicitor for the prisoner to the manager of the railway. In order to make that letter admissible, it was necessary to show that it was written by the instructions of the prisoner. To show that, a question was put by the counsel for the prosecution to the counsel which was right in form, viz.: Did you write that letter by the direction of the prisoner? and, if that question had been answered in the affirmative, the letter would have been admissible; but that question was not allowed to be put, and then the counsel put the question in this form: “Did you write this letter in consequence of an interview with the prisoner?” A letter written by the instruc-

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tions of the client is equivalent to a letter written by the client himself. But that is not the effect of the question put, "Was this letter written in consequence of the interview with the prisoner?" that is, "after the interview with the prisoner," and the answer clearly does not make it admissible in evidence against the prisoner. The letter having been admitted as part of the case for the prosecution against the prisoner, the conviction must be quashed.

DENMAN, J.—I am of the same opinion. The court are unanimous that the question put in the first instance by the counsel for the prosecution was not objectionable on the ground of privilege, because this was a criminal case. The letter was tendered to show that the prisoner had made an inordinate claim. There was no evidence to show that the solicitor had written anything for which the prisoner was criminally liable, and therefore the conviction must be quashed.

MANISTY, STEPHEN, and WATKIN WILLIAMS, JJ. concurred.

*Conviction quashed.*

## COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED.

*Saturday, December 4, 1880.*

(Before Lord COLERIDGE, C.J., FIELD, LOPES, STEPHEN, and  
WATKIN WILLIAMS, JJ.)

REG. v. MICHELL. (a)

*Misdemeanour—Debtors Act, 1869 (32 & 33 Vict. c. 62), sect. 11,  
sub-sect. 1—Full and true disclosure by bankrupt of all his  
property—Limit of time to which the disclosure relates.*

*The 32 & 33 Vict. c. 62, s. 11, sub-sect. 1, enacts that a bankrupt  
or liquidating debtor shall be guilty of a misdemeanour "if he  
does not to the best of his knowledge and belief fully and truly  
discover to the trustee of his estate all his property, real and  
personal, and how and to whom, and for what consideration, and  
when he disposed of any part thereof, except such part as has  
been disposed of in the ordinary way of his trade (if any), or  
laid out in the ordinary expense of his family, &c."*

*Held, that the disclosure was not restricted to property in possession  
of the bankrupt at the commencement of his bankruptcy.*

CASE reserved for the opinion of the Court for the Considera-  
of Crown Cases Reserved, by the Common Serjeant of the  
City of London, at the January Sessions, 1880, of the Central  
Criminal Court.

The defendant was tried before the Common Serjeant on the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

16th day of January, 1880, and following days, on an indictment under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, sub-sects. 1, 12, 14, and 15, and s. 13, sub-sect. 1, and also under sects. 88 and 89 of the Larceny Consolidation Act (24 & 25 Vict. c. 96.)

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The indictment contained thirty-eight counts, and the defendant was convicted upon all the counts except the second, sixth, seventh, eighth, twenty-first, and thirty-fifth counts.

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The question reserved for the opinion of this Court was in the following terms: If the Court should be of opinion that there was no evidence to go to the jury on any of the counts of the indictment (except evidence which was objected to by the defendant's counsel, and which the learned Common Serjeant was wrong in admitting), the conviction is to be quashed.

*W. H. Olay* (*Lyon* with him) appeared for the prisoner.

LORD COLERIDGE, C.J.—We need not go through the whole of this voluminous case, for if the Court should be against you on any one count of the indictment on which the jury have found him guilty, the conviction will stand. We will hear what you have to say as regards the first count of the indictment.

The first count was in the following terms:

Central Criminal Court to wit.—The jurors for our Lady the Queen upon their oath present that Frederick Michell was, on the 1st day of May in the year of our Lord 1879, adjudicated a bankrupt in the London Court of Bankruptcy, upon the petition of Robert Hyde and others, trading together under the style of Robert Hyde and Co. Limited, duly filed in the said Court on the 1st day of April in the year of our Lord 1879, and that on the 21st day of May in the year of our Lord 1879, one Edward Pryor Everett was duly appointed the trustee to administer the estate of the said Frederick Michell for the benefit of his creditors. And the jurors aforesaid upon their oath aforesaid do further present that the said Frederick Michell afterwards, to wit on the said 21st day of May in the year of our Lord 1879, and from that day up to the day of taking this inquisition, and within the jurisdiction of the said Central Criminal Court, unlawfully and with intent to defraud, did not to the best of his knowledge and belief fully and truly discover to the said Edward Pryor Everett, then being such trustee administering his estate for the benefit of his creditors as aforesaid, how, and to whom, and for what consideration, and when, he had disposed of a certain part of his personal property, to wit, goods of the value of 4000*l.*, and 4000*l.* in money, the same not having been disposed of in the ordinary way of his trade, nor laid out in the ordinary expense of his family; contrary to the form of the statute in such case made and provided and against the peace of our Lady the Queen, her Crown and dignity.

The evidence upon which the defendant was convicted on this count related to goods bought by him in the years 1877-8, and to goods bought from a person named Keighley, and almost immediately afterwards sold by him at a loss to a person named Harefield, and to goods bought from his creditors set out in list A of his statement of affairs in bankruptcy.

The defendant's counsel at the trial submitted that there was no evidence to go to the jury in support of the first count, and insisted that the sub-section in the Debtors Act on which the first count was founded only requires the bankrupt to disclose his dealings in relation to property which he had under his control at the time of the act of bankruptcy (28th day of January, 1879), and to which his trustee is entitled, and which is divisible among

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his creditors, and therefore that the evidence as to the defendant's purchases from Keighley, and resales to Harefield at a loss between the months of January and July, 1878, had no bearing on the offence charged in the first count.

For the prosecution it was submitted that, as the latter part of the sub-section requires a disclosure to be made of property which the prisoner has disposed of, and omits the words "in his custody or control," which are to be found in sub-sect. 2, the word "property" in the first sub-section must have a wider meaning than that contended for by the defendant's counsel, and must include property to which the trustee would have been entitled, and which would have been divisible among his creditors if the prisoner had not put it out of the trustee's reach by disposing of it, and that therefore the defendant was bound to disclose his transactions in 1878.

The case of *Reg. v. Bolus* (11 Cox C. C. 610) was cited, where the Recorder of Birmingham, A. B. Adams, Q.C., in summing up, said that the sub-section in question "provided that a person seeking to be discharged of his debts should make a full and free disclosure of his transactions for a considerable time immediately preceding his bankruptcy."

The Common Serjeant held that the evidence of purchases from Keighley and resales at a loss to Harefield, between the months of January and July, 1878, had a distinct bearing on the offence charged in the first count, because they were part and parcel of the reckless course of trading which led directly up to the act of bankruptcy.

It is unnecessary to set out the evidence in detail, as the Court were clearly of opinion that it warranted the conviction if it was properly receivable on the first count.

*Obay.*—The Common Serjeant was wrong in receiving this evidence upon the first count of the indictment. That is framed upon sub-sect. 1 of sect. 11 of the Debtors' Act, 1869 (32 & 33 Vict. c. 62), which enacts, "Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement, shall in each of the cases following be deemed guilty of a misdemeanor;" that is to say, (1), "if he does not to the best of his knowledge and belief fully and truly disclose to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud." The words "all his property" are restricted to his property at the time of his bankruptcy. By sect. 3 of the 32 & 33 Vict. c. 62, "words and expressions defined or explained in the Bankruptcy Act, 1869, are to have the same meaning in the Debtors Act, 1869." And, by sect. 15 of the Bankruptcy Act, 1869, the words "property divisible among the creditors are to comprise all such property as may belong to, or



be vested in, the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance."

*Grain* (Avory with him), for the prosecution, was not called upon to argue.

LORD COLERIDGE, C.C.—I am of opinion that the conviction should be affirmed. The question arises on the words of sect. 11, sub-sect. 1, of the 32 & 33 Vict. c. 62 (the Debtors Act, 1869), which are these: [Reads it:] The contention for the defendant is, that the disclosure is to be restricted to property which the bankrupt had at the time of his bankruptcy, and that, because by sect. 3 of the 32 & 33 Vict. c. 62, it is enacted that "words and expressions defined or explained in the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), shall have the same meaning in this Act;" and because, in the Bankruptcy Act, 1869, it is enacted that the words "property divisible among the creditors" shall comprise "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance." I am of opinion that there is no ground for such a construction. The great object of sect. 11 of the Bankruptcy Act, 1869, was to create several offences, into all of which fraud of the creditors enters, and in some of which it is enacted that the fraud must have taken place within the period of four months next before the bankruptcy; and, if the whole section is looked at, it will be found to contain a most complete and absolute scheme providing for the discovery of the bankrupt's property. It seems to me perfectly plain that sub-sect. 1 of sect. 11 must relate to other property than what the bankrupt has at the time of his bankruptcy. It was said that, if that was its meaning, a bankrupt might come within it if he did not disclose something relating to his dealings with property that he may have had within five years before his bankruptcy. If there was nothing fraudulent in such dealings, it does not fall within the sub-section; but, if the question of fraud arises, there is no reason why it should not be inquired into. The fact of the lapse of five years, in the absence of any evidence of fraud, would be strong to show that the transaction was not within the sub-section. I therefore think that the count is a good count.

FIELD, J.—I am of the same opinion, and entertain no doubt upon the point. The two Acts, the Debtors Act, 1869, and the Bankruptcy Act, 1869, are to be taken and read together. Sect. 15 of the Bankruptcy Act first defines the property which is to vest in the trustees, and then that which is in the apparent ownership of the bankrupt at the commencement of his bankruptcy. But the latter may be the smallest portion of his property, because in some cases the bankrupt takes means before his bankruptcy to dispose of his property among his relatives and friends. Then the Legislature has said that is not sufficient unless we (the Legislature) give the trustees the means of finding out all about the bankrupt's property, and compel the bankrupt to

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fully disclosing  
his property.*



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fully disclosing  
his property.*

disclose all about it. It is said that this sub-section was only meant to apply to property which he had on the day he became bankrupt. That cannot be the meaning of it. The exception in sub-sect. 1 of sect. 11, "except such part as has been disposed of in the ordinary way of his trade," shows the contrary.

LOPES, J., concurred.

STEPHEN, J.—I am of the same opinion. With respect to the definition of the word "property," it is obvious that the definition in sect. 15 of the Bankruptcy Act, 1869, only applies to the definition of the words, "property divisible among the creditors," and it was not intended that that definition should apply wherever the word "property" occurs in the Acts; for, in sect. 4 of the Debtors Act, 1869, there is a definition of the word "property" which is to be taken in the widest sense of that word.

WATKIN WILLIAMS, J., concurred.

*Conviction affirmed.*

## COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED.

*Saturday, December 4, 1880.*

(Before Lord COLERIDGE, C.J., FIELD, LOPES, STEPHEN, and  
WATKIN WILLIAMS, JJ.)

REG. v. G. SALMON, J. SALMON, AND A. HANCOCK. (a)

*Manslaughter—Rifle practice—Duty to prevent danger to public  
—Dangerous place.*

*Three persons went out together for rifle practice. They selected a field near to a house, and put up a target in a tree at a distance of about a hundred yards. Four or five shots were fired, and by one of them a boy who was in a tree in a garden at a distance of three hundred and ninety-three yards was killed. It was not clear which person fired the shot that killed the boy.*

*Held, that all three were guilty of manslaughter.*

CASE reserved for the opinion of this Court by Lord Coleridge, C.J., at the Summer Assizes at Wells, 1880.

The three prisoners were tried before me on the 27th day of July, 1880, for the manslaughter of William Wells, a little boy of ten years old, under the following circumstances:

George Salmon is a member of the Frome Selwood Rifle Corps. On the 29th day of May he attended the rifle practice. He took his rifle from the armoury, had fourteen ball cartridges served out to him, and fired them all away. After the practice was over, he took away with him his rifle, which it was his duty to

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

return to the armoury. He did not take it back, and the drill instructor missed six cartridges from the magazine when he went there about half an hour after the practice was over.

About seven o'clock, that is shortly after the practice was over, the three prisoners came together to the house of a witness (Newport) who was called, and whose evidence, so far as it is material to the point to be determined, was as follows :

"The three prisoners came to my father's house somewhere about seven in the evening on the 29th day of May. George Salmon had a rifle with him and some ball cartridges. All three wanted to fire off one or two shots, and they asked me for something to fire at. I gave them a board from our fowl house. I went with them into a field close by, and the prisoner Hancock climbed into a tree. George Salmon handed up the board to him. Hancock fixed it in the tree about eight feet from the ground. They all went about a hundred yards up the field, and all laid down in the grass. I heard two shots. I cannot tell which of them fired the shots, for I was looking at the board. I am not sure whether the first shot struck the target ; the second shot did strike it. I do not know which of them fired it. Two more shots were fired afterwards, when Wells and Knight came running up and told us what had happened."

The place where the shot was fired, and all the surrounding houses and roads, are correctly delineated in a plan which was proved before me and marked by me at the time. To that plan I beg leave to refer the court as conveying a clearer view of the place and its surroundings than any statement of mine could convey.

"What had happened," to use the words of the witness Newport, was this : The deceased William Wells was with his young sister in his father's garden, and her evidence was as follows :

"I remember the evening of the 29th day of May. There is a low apple tree in my father's garden, with a rose tree in it. My brother got up into the apple tree to water the rose. While my brother was in the tree I heard a shot ; it passed through the tree, for some of the leaves fell down from the tree. I called to my brother, but he answered me and said he was safe. Then there was another shot, and my brother fell out of the tree dead on the ground. There were four or five shots fired altogether ; I think the second shot killed him."

It was proved that the distance from the spot where the shot was fired to the tree in which the boy was killed was three hundred and ninety-three yards ; but the rifle was sighted for nine hundred and fifty yards, and would probably be deadly at a mile.

The evidence of conversations after the death had been caused, as to the person who fired the shot, was as follows :

Joseph Wells, the father of the little boy, the first person who came to the prisoners after the shot, said, "When I first came

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Manslaughter  
—Rifle  
practice.

up I saw Hancock and Newport and John Salmon. I told them what had been done, and that they had killed my boy. They seemed very sorry, and wished they had not done it. I asked them where the rifle was. They said it was flung down in the field, but we could not find it. I left Hancock and John Salmon in charge of Knight."

Jonathan said, "I saw the three prisoners with Newport in the field. I called to them to stop firing. I came on Hancock and Newport and John Salmon. I saw George Salmon at first, but he was not there when I came up. I told them they had killed a boy, and I said where is the gun? They went back to find it, and could not, and said that George must have taken it away."

William Parsons said: I went to Newport's house. There I saw Hancock and John Salmon. I went with them to the field, and they showed me the tree in which was the target. The bottom of the target was about ten feet from the ground. I took John Salmon and Hancock to the police-station. Then I went to George Salmon's. He said, when I took him into custody, "Don't blame my brother for it; it was I that did it." I took him to the station. When the three were together there George Salmon said, "I fired the shot." Hancock said, "We all three fired one each." George said, "I fired the first shot, and it must have been I that killed the poor boy."

The rifle was afterwards found in George Salmon's house, and it and two cartridges found in the field were identified by the drill inspector; the rifle as being the rifle George Salmon ought to have returned to the armoury on the evening of the 29th day of May; the cartridges as cartridges similar in all respects to those six which he had missed from the armoury on that evening.

The jury found all the prisoners guilty of manslaughter, but I allowed them to go out on bail till I could take the opinion of the Court of Criminal Appeal on the case.

I have to request the opinion of the Court whether there was any evidence upon which either or all of the prisoners could be convicted of manslaughter.

(Signed) COLERIDGE.

No counsel appeared to argue on behalf of the prisoners.

*Norris* for the prosecution.—The prisoner who fired the fatal shot was clearly guilty of manslaughter, but the evidence of his identity not being clear, the rule that all persons engaged in a common enterprise are jointly liable will apply. All the prisoners went into the field for a common purpose—rifle practice—and it was their duty to take all proper precautions to prevent any danger to other persons. The plan attached to the case shows that they fired across three highways, and that they were firing too near to the neighbouring gardens, in one of which the deceased boy was.

LORD COLERIDGE, C.J.—I am of opinion that the conviction was right and ought to be affirmed. If a person does a thing which in itself is dangerous, and without taking proper precautions to prevent danger arising, and if he so does it and kills a person, it is a criminal act as against that person. That would make it clearly manslaughter as regards the prisoner whose shot killed the boy. It follows as the result of the culpable negligence of this one, that each of the prisoners is answerable for the acts of the others, they all being engaged in one common pursuit.

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—*Rifle Prac-*  
*tice.*

FIELD, J.—I am of the same opinion. At first I thought it was necessary to show some duty on the part of the prisoners as regards the boy, but I am now satisfied that there was a duty on the part of the prisoners towards the public generally not to use an instrument likely to cause death without taking due and proper precautions to prevent injury to the public. Looking at the character of the spot where the firing took place, there was sufficient evidence that all three prisoners were guilty of culpable negligence under the circumstances.

LOPES, J. concurred.

STEPHEN, J.—I am of opinion that all three prisoners were guilty of manslaughter. The culpable omission of a duty which tends to preserve life is homicide; and it is the duty of every one to take proper precautions in doing an act which may be dangerous to life. In this case the firing of the rifle was a dangerous act, and all three prisoners were jointly responsible for not taking proper precautions to prevent the danger.

WATKIN WILLIAMS, J. concurred.

*Conviction affirmed.*

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## CENTRAL CRIMINAL COURT.

*Wednesday, December 15, 1880.*

(Before Sir WILLIAM CHARLEY, Common Serjeant.)

REG. v. LARNER. (a)

*False pretences—Entry to race—Obtaining prize—Remoteness.*

*The prisoner was charged with obtaining a prize in a certain swimming race by false pretences. He obtained his competitor's ticket for the race by representing himself to be member of a certain club, and by a letter purporting to be written by the*

(a) Reported by W. AUSTIN METCALFE, Esq., Barrister-at-Law.

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*secretary of that club. On the faith of these representations— which turned out to be false—he was allowed twenty seconds start in the race, and won the prize :*

*Held, by the Common Sergeant after consulting Stephen, J., that the false pretences were too remote, and that the count charging them could not be sustained.*

**W**ILLIAM LARNER was charged under an indictment containing counts for false pretences, forgery, and uttering. The first count set forth the false pretences as follows: "That the said William Larner was member of a certain club called and known as the Myddleton Swimming and Athletic Club, and that a certain letter which he, the said William Larner, had caused to be received by one Alfred Ernest Endin, had then been written and sent by one Henry Green, the secretary of the said club, and that he, the said William Larner, as member and competitor in certain club swimming races and matches by members of the said club, had been allowed to start from the starting point twenty-five seconds before certain other competitors.

*Purcell* for the prosecution.

*Keith Frith* and *Rundle Levey* for defendant.

On the 23rd day of August a swimming handicap took place at the Surrey County Baths. Entries were to be made previously to Alfred Endin, Esq., and competitors to be handicapped by qualified persons. A competitor's ticket was issued by Mr. Endin to each accepted entry. The length of the course was 100 yards, and there being a good many entries the race was swum in heats.

A programme was printed and circulated, containing, amongst other matters, the names of the competitors and the arrangement of the various heats, and on that programme appeared the name of W. Larner, to whom a start of twenty seconds had been assigned.

Some few days before the issuing of the programme, Mr. Endin received the following letter :

Nelson Club, 90, Dean-street, Oxford-street.  
August 19, 1880.

Sir,—I inclose entrance fee for another entry for your 100 yards handicap. W. Larner (Middleton Swimming and Athletic Club) in Club races receives twenty-five seconds from scratch.—I remain, sir, yours respectfully,

H. GREEN, Hon. Sec.

Another letter of the same kind had been received by Mr. Endin entering one Binns for the same race. The letters were received in the usual course through the Post-Office. The two entries of Larner and Binns were accepted, and the entrance fee of 2s. 6d. each paid. Mr. Endin stated that he knew nothing about Larner or his accomplishments as a swimmer; that he received his entry in consequence of the representations contained in the letter, and that the start of twenty seconds was apportioned to him for the like reason. He further stated that he handed Larner a competitor's ticket; that Larner swam in the competition, and after being second in his own heat won the final easily. It was believed that Larner could have won the race from scratch.

For the prisoner it was objected that the false pretences were too remote, that if he obtained anything thereby it was the competitor's ticket, and not the cup; that the cup was obtained by his own bodily activity; and that the case fell within *Reg. v. Gardner* (1 Dears. & B. C. C. p. 40; 7 Cox C. C. 136), in which case the prisoner had at first obtained lodgings only by a false representation, and after he had occupied the lodgings for a week he obtained board; and it was held that the false pretences were exhausted by the contract for lodging, the obtaining board not having apparently been in contemplation when the false pretence was made.

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For the prosecution it was urged that the false pretence was a continuing one, that the winning of the cup was clearly in the contemplation of the prisoner when he entered for the race, and that the judgment of Willes, J., in *Reg. v. Gardner*, citing *Reg. v. Abbott* and *Reg. v. Burgess*, was an authority the other way. They also cited *Reg. v. Martin* (L. Rep. 1 Cr. Cas. Res. 56; 10 Cox C. C. 383.)

Held, by the Common Serjeant, after conferring with Stephen, J., in the Old Court, that the objection must prevail as the false pretences were too remote.

The prisoner was afterwards tried for uttering the letter knowing it to be forged, and convicted.

## CENTRAL CRIMINAL COURT.

*Friday, December 17, 1880.*

(Before Mr. Justice STEPHEN.)

REG. v. O'CALLAGHAN AND OTHERS. (a)

24 & 25 Vict. c. 100—*Indictment—Inciting to commit crime—Too general—Amendment.*

*Where the case has not been inquired into before a magistrate but the bill has been merely found by the grand jury, the court will not go out of its way to assist the prosecution by amending the indictment and inserting certain names, on objection taken that the charges therein set out are not specified with sufficient particularity.*

THE defendants were indicted for a misdemeanour in tempting and soliciting one Thomas Titley to commit a crime, viz., to procure the miscarriage of a certain woman.

The case arose out of *Reg. v. Titley*, where the police had set a

(a) Reported by W. AUSTIN METCALFE, Esq., Barrister-at-Law.



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trap for the defendant, a chemist, and procured his conviction for selling noxious drugs: (see p. 502).

*Edward Clarke, Q.C., and Besley* for the prosecution.

*Poland and Montagu Williams* for the defence.

The indictment was as follows:

Central Criminal Court to wit.—The jurors for our Lady the Queen upon their oath present, that John O'Callaghan, Phillip Shrides, William Stroud, and Martha Diffey, on the 11th day of November, in the year of our Lord 1880, and on divers days and times thereafter between that day and the date of this inquisition within the jurisdiction of the said Central Criminal Court, by divers artful and subtle means, stratagems, tricks, and devices, and by divers false representations, did attempt and endeavour to seduce one Thomas Titley to commit an indictable misdemeanour, to the great damage and injury of the said Thomas Titley, to the evil and pernicious example of all others in the like case offending, and against the peace of our Lady the Queen, her Crown and dignity.

Second count:

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John O'Callaghan, Phillip Shrides, William Stroud, and Martha Diffey, on the 11th day of November, A.D. 1880, and on divers days and times between that day and the day of taking this inquisition, unlawfully, wickedly, and maliciously did attempt and endeavour to induce the said Thomas Titley to contravene the law of the land, with the intent that the said Thomas Titley should thereafter be convicted of an offence and punished, to the great damage and prejudice of the said Thomas Titley and against the peace of our Lady the Queen, her Crown and dignity.

Third count:

And the jurors aforesaid, upon their oath aforesaid, do further present that the said John O'Callaghan, Phillip Shrides, William Stroud, and Martha Diffey, on the 11th day of November, A.D. 1880, and on divers days and times between that day and the day of taking this inquisition within the jurisdiction of the said Central Criminal Court, unlawfully, wickedly, and maliciously did solicit the said Thomas Titley to commit a criminal and indictable offence to the great damage of the said Thomas Titley, and against the peace of our Lady the Queen, her Crown and dignity.

Fourth count:

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said John O'Callaghan, Phillip Shrides, William Stroud, and Martha Diffey, on the 11th day of November, A.D. 1880, and on divers days and times thereafter between that day and the date of this inquisition, unlawfully, wickedly, and maliciously did solicit, incite, and endeavour, so far as in them lay, to persuade the said Thomas Titley to unlawfully supply a noxious thing, knowing that the same was intended to be unlawfully used with intent to procure the miscarriage of a woman, and thereby to contravene the provisions of the statute (24 & 25 Vict. c. 100), to the great damage and prejudice of the said Thomas Titley, and against the peace of our Lady the Queen, her Crown and dignity.

*Poland.*—The first three counts are clearly bad. The words are far too general. It is not sufficient to charge the defendants generally with having committed an offence, but the facts and circumstances constituting the offence must be set out. Here it is impossible for the defendants to tell what is the particular charge alleged against them. The defendants are charged with inciting one Thomas Titley to commit a crime, and no information is given as to what is the nature of that crime. With regard to the fourth count, there it is true that a crime is specified, viz., "to unlawfully supply a noxious thing, &c.," but this is not sufficient. It should be stated to whom the noxious thing was supplied. Some person's name must appear. And further "with intent to procure the miscarriage of a woman" is not sufficient. The woman must be specified, not necessarily by

name, but as one "to the jurors unknown," or in some way to fix a particular woman as the person for whom the drug was intended. He further mentioned that the case had never been inquired into before a magistrate, or in any other way, and contended there was the need for greater accuracy on that account.

*Clarke* and *Besley* abandoned the first three counts of the indictment, but contended that the fourth was a good count, or at any rate submitted that his Lordship should amend by the insertion of what names might be necessary. The special amendment they suggested was the insertion of the name of William Stroud in the earlier, and the "daughter of Martha Diffe" in the later part of the count. They reminded him that the prosecution yesterday (*Reg. v. Titley, post, p. 502*) had been allowed to make an amendment identical with one which they now desired.

STEPHEN, J.—With regard to the first three counts of this indictment I need say but little. It is in fact admitted by the prosecution that they cannot be supported, and I entirely agree with them. The fourth count is somewhat different. As it stands, I am of opinion that it is bad for the reasons urged on me by Mr. Poland, viz., that it does not set out the name of any person to whom the drugs were supplied, nor does it point out any particular woman for whom the drug was intended. I am however pressed by Mr. Clarke to amend by inserting the requisite name, and am reminded that at the commencement of yesterday's trial (*Reg. v. Titley, post, p. 502*) I allowed the second amendment to be made, and the words "by a certain woman to the jurors unknown" to be inserted. This was so, and I should have no hesitation in allowing the same amendment, were that all that was requisite to support this count. To do so effectually, however, I should have to allow another and different amendment, and this I am not disposed to do. I have been reminded that there has been no preliminary examination into this matter, and that the grand jury have returned this identical bill. On the one hand I am loth to quash an indictment for what may be merely an error of the pleader; on the other, I remember that where a case comes before me without previous inquiry, substantial injustice may be done by making alteration in the terms of the bill sent down by the grand jury. On the whole I decline to make the proposed amendment, and therefore the whole indictment will fail; but of course this will in no way prejudice any further indictment to be prepared hereafter.

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*Indictment quashed.*

## CENTRAL CRIMINAL COURT.

*Thursday, December 16, 1880.*

(Before Mr. Justice STEPHEN.)

REG. v. THOMAS TITLEY. (a)

*Supplying noxious thing—Intending to procure abortion—24 & 25 Vict. c. 100, s. 59—Indictment.**Supplying a noxious thing to a person with the intent that it shall be used by a certain woman to produce abortion is a misdemeanour within the 24 & 25 Vict. c. 100, s. 59, although the woman for whom it was intended by him was not pregnant.**On objection before plea to the first count of the indictment that the words "a certain woman" were too vague, and therefore that the count was bad, the judge allowed the prosecution to amend by inserting the words "a woman to the jurors unknown," instead of the words objected to.*

**THE** defendant was indicted for unlawfully supplying to William Stroud a quantity of ergot of rye and tincture of perchloride of iron, well knowing that the same was intended to be unlawfully used with intent to procure the miscarriage of a certain woman.

A second count varied the charge by alleging that the woman was the daughter of one Martha Diffey.

*Poland and Montagu Williams* for the prosecution.

*Edward Olarke, Q.C., and Besley* for the defence.

Before the plea, *Olarke, Q.C.*, objected to the first count on the ground that it was too general.

STEPHEN, J., allowed the prosecution to amend by alleging that the offence was intended to be committed on "a woman to the jurors unknown."

The defendant was a chemist, and the evidence for the prosecution showed that the police authorities had laid a trap for him.

A woman named Martha Diffey was sent to the defendant's shop by Inspector O'Callaghan. Martha Diffey was the wife of a police constable, and was the mother of two daughters, aged twenty and sixteen, neither of whom were pregnant, or in need of any instruments or drugs for procuring abortion. Mrs. Diffey saw the defendant at his shop, and said to him, "My daughter is in trouble, will you help her?" The defendant said, "Who sent you?" She replied, "A friend of the young man." The defendant said, "How long is she gone?" She replied, "Three

(a) Reported by W. AUSTIN MERCALFE, Esq., Barrister-at-Law.

months." The defendant then asked to see the girl, but was told that she would not come.

This conversation was reported to O'Callaghan, who concocted a letter and sent it to Titley by the woman.

The letter purported to come from the young man before referred to, and is as follows :

Saturday, Nov. 18, 1880.

Dear Sir,—This woman's daughter, who was in our service, is about three months advanced in pregnancy, and is naturally desirous of getting rid of her trouble. A friend has informed me of your skill in such matters, and I have advised the girl to call on you; she has, however, some hesitation in doing so, and the mother who has been to me informs me that in her absence you have some difficulty in prescribing effectually. As a man of the world you will quite understand my position in the matter. The mother is a virago, and constantly accuses me of having been the ruin of her family; and the daughter, although not quite so bad, is getting troublesome too. If the thing goes on to the end I shall have to pay; I should prefer doing so now, and so get rid of an annoyance which is becoming intolerable. I have, however, no desire to be seen in the matter; my part will be to pay, and I should be glad of your advice as to what is the best to do under the circumstances. I can understand how desirable it is that you should see the girl herself, but I have hitherto failed to persuade her to go and see you. Kindly say whether you cannot possibly prescribe in her absence, and I shall be glad to pay any sum which may be reasonable for the service rendered, and I shall, moreover, be indebted to you for relieving me of an annoyance which is becoming unbearable. I can send you no money by this woman, as I am uncertain that it will reach you. In your note say how I am to remit.

Faithfully yours,

— Titley, Esq.

H. W.

This letter was accepted and read by Titley, who wrote in reply as follows :

Saturday Night.

Dear Sir,—This is an awkward and unpleasant business to write about, and to a stranger. I should rather see you, it would give me confidence. I am not at all anxious to assist a person who does not wish to be seen. You must call on me if you wish me to help you, otherwise I must decline. I can speak what I cannot here write, and advise you to your advantage. Shall be here to-morrow evening (Sunday), from half-past six till ten.

Yours, &c.,

T. T.

On the receipt of this letter by Inspector O'Callaghan, it was arranged by him, in concert with the authorities at Scotland Yard, that a police officer should be sent to Titley's shop to represent the pretended seducer. A police sergeant named Stroud was accordingly selected, and was entrusted with five bank notes of 5*l.* each. On the next day he went to Titley's shop, and introduced himself as the writer of the letter. The prisoner said to Stroud, "The girl must be brought to me." Stroud replied, "It is quite impossible." Titley then showed a number of bottles, each containing a foetus, one of which he pointed out as the most successful operation he had performed. He further said, "My business generally lies with ladies whose husbands are away. I think I can give her something, but it will not be so successful as an operation." He then proceeded to fill two bottles, which he handed to Stroud, at the same time saying, "You must give it to her three times a day, and she must put her feet in hot water at night," with other directions. Stroud then gave him one of the 5*l.* notes, taking care that the defendant should see the four others, and in change for this Titley returned 4*l.* 16*s.*

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v.

THOMAS  
TITLEY.

1880.

Indictment—  
Amendment.

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THOMAS  
TITLEY.  
—  
1880.  
—  
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The prisoner was then apprehended, when he tried to tear up the letter signed "H. W."

At the trial evidence was given that the bottles contained a mixture of ergot of rye and tincture of iron perchloride, and that such a mixture would in all probability be dangerous if administered to a pregnant woman, and would probably operate by producing a miscarriage.

*Edward Clarke*, Q.C., for defendant.—There is no evidence to support the indictment. The woman is alleged in the first count to be "a woman to the jurors unknown," and, in the second, to be a "woman, the daughter of one Martha Diffey." With regard to both counts, the objection will apply that there was no person in existence for whose use the medicine was given, inasmuch as the only person for whom it could be intended was one who was not, and never had been, pregnant. With respect to the case of *Reg. v. Hillman* (9 Cox C. C. 386; L. & C. 343), there was there actually a person to whom the medicine was to be given, and one who believed herself to be pregnant. The case of *Reg v. Collins* (9 Cox C. C. 497; L. & C. 471) is in point. There it was held that there could be no conviction for attempted larceny where the prisoner put his hand into the empty pocket of the prosecutor. Here there is no woman who is in a condition to be made the subject of an abortion.

STEPHEN, J. overruled the objection, and, in his charge to the jury, said: "The case of *Reg v. Israel Hillman* is precisely in point, and I am of opinion that the evidence brings this offence within the section of the statute. If a man supplies any noxious thing, intending it to be used to procure the miscarriage of a woman, it is immaterial whether there is a woman in a state fit to be the subject of the operation or not. It does not matter in the least whether Mrs. Diffey intended her daughter to use this medicine. You have first to consider whether the medicine was supplied by the prisoner to Stroud; secondly, whether such medicine, if so supplied, was a noxious thing. In case you should find both those issues in the affirmative, you have further to consider: What was the intention of the prisoner when he supplied it? If the intention in his mind was that it should be applied for the purpose of procuring the miscarriage of Martha Diffey's daughter, you must convict him."

*Verdict, Guilty.*

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### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

*Tuesday, December 28, 1880.*

(Before FITZGERALD and BARRY, JJ.)

REG. ON THE PROSECUTION OF THE RIGHT HON. HUGH LAW, HER MAJESTY'S ATTORNEY-GENERAL IN IRELAND, v. CHARLES STEWART PARNELL, M.P., AND OTHERS. (a)

*Special jury struck under the old system—Right of traverser to challenge six jurors—Reg. v. Casey (13 Cox C. O. 645) commented on and followed—39 & 40 Vict. c. 78, s. 10.*

*In a criminal information for conspiracy, where the trial takes place before a special jury struck under the old system the traverser is entitled to six challenges from the reduced panel:*

*Held (per Barry, J., Fitzgerald, J., dissentiente) that the doctrine on this point is correctly stated by May, C.J., in Reg. v. Casey (13 Cox C. O. 645).*

**T**HIS was a criminal information for conspiracy (see the indictment set out hereafter at p 508).

On the motion of the Attorney-General it was ordered that the trial do take place at bar before a special jury of the city of Dublin struck under the old system. The original panel of forty-eight was accordingly reduced to twenty-four, the Crown and the traversers alternately striking off a name till each side had struck off twelve.

On Joseph Madders, one of the remaining jurors, coming to the book to be sworn, he was challenged by the traversers. The Crown demurred to the challenge. The Court having expressed a desire to hear the question fully argued,

The *Attorney-General* (Law), with him the *Solicitor-General* (Johnson), *Heron*, Serjt. *Murphy*, Q.C., *Porter*, Q.C., *Naish*, Q.C., *Ross*, and *Molloy*, for the Crown.—The provisions of this Act (39 & 40 Vict. c. 78) deal with both civil and criminal trials alike. The Crown has no right of challenge properly so called. This trial is brought under the old jury system, which is as old as the common law itself. Each party has in substance the right to challenge twelve jurors, which reduces the panel to twenty-four. Now this Act gives for the first time in our history a right of

(a) Reported by ORCEL R. ROOPE, Esq., Barrister-at-Law.



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challenge in civil cases, and in misdemeanours. It is clear that in ninety-nine cases out of one hundred, if this right which is claimed for the traversers exists there will be a default of jurors; for if only twenty-three out of the twenty-four jurors attend, and each side may insist on its right of challenging six, one of two things must occur — there will be a default of jurors, or one side must give up its right of challenging. The proper construction of the 10th section is that there is not a right of challenge in a case of this sort, when dealing with a panel which has already been reduced. It seems that the language of the statute is only applicable to the class of cases with which it is primarily dealing; namely, where there is a panel of fifty or one hundred names, in which case the party has a right to strike out six. The proceedings before the master in substance are equivalent to a challenge.

*McDonagh*, Q.C., with him *Walker*, Q.C., *McLoughlen*, Q.C., *Peter O'Brien*, Q.C., *Curran*, *Nolan*, *Adams*, *Luke Dillon*, and *A. M. Sullivan* for the traversers, *contra*.—The learned Attorney-General has argued this question *ab inconvenienti*, but this argument has no force in law, when the language of the statute is clear. It is plain that certain rights of challenge formerly existed, but in cases of misdemeanour there was no such right. It was for that reason that this 10th section was passed, which defined the rights of challenge. Sect. 39 enacts that the same course should be pursued as had formerly been. The proceedings in the master's office did not give a challenge at all; that was only a means of avoiding the predominant influence of the Crown. The twenty-four names which were removed never were on the panel, and were never the subject-matter of a challenge. I maintain that in all trials on information, or for misdemeanour, the person or persons on trial are entitled to challenge without cause in all six persons. I rely on the case of *Reg. v. Oasey* (13 Cox C. C. 645), decided in this court. (He then read the judgment of May, C.J.)

*Walker*, Q.C.—This manner of striking a jury grew out of an ancient custom; the sheriff was ordered to return twenty-four names in order that the right of challenge be not lost. The way in which this special jury arose was by an order of the court (1 Salkeld 450.) The removing names is not a challenge, but a way of removing names of persons who cannot serve, *e.g.*, dead men. In the Act there are several provisions which refer to the way a defect in the panel can be remedied. In one case provision is made for a *tales*.

FITZGERALD, J.—In the case before us, if there is to be a *tales*, it must be by common law, not under the statute.

The *Solicitor-General* replied.

FITZGERALD, J.—My opinion is against the decision to which we have been referred by counsel. The language of the section is no doubt precise; but it is only on a minute review of the several provisions of the statute, and of the whole code, that I

derive my present impression, an impression which I would be prepared to act upon if I were sitting alone. My impression is that every word of the Act can be satisfied without extending the provisions of sect. 10 of the Act to a special jury under the old system. Upon a close and minute review of and examination of the provisions of the Act, I think the Legislature did not intend sect. 10 to apply to a case where the jury had been struck under the old system. The Legislature intended to leave it as it stood at common law. And I certainly think that in such a case, before the passing of this Act, there was nothing like a peremptory challenge on the part of the traverser, nor on the part of the Crown a right to direct a juror to stand by. But I find on the other side the decision on demurrer by the Lord Chief Justice, and my brother Barry, who has considered these matters beforehand, and has spoken to the Lord Chief Justice, who informed him that he adheres to his former opinion, as expressed in that case (*Reg. v. Oasey*) to which we have been referred. In addition to that the opinion of my brother Barry is in accordance with that of the Lord Chief Justice; and that being the state of the authority I think the better course is that I should withdraw my opinion, and the judgment of the court will be that the challenge is allowed.

BARRY, J.—The question is one of very grave doubt and very great difficulty. It is impossible to conceive that this question of the right to challenge in the case of a jury struck under the old system was before the mind of the person who prepared the 10th clause. At the same time I cannot set aside the express language of that section to meet an argument which it seems to me is entirely based on convenience. I think it would be inconsistent with the well known rules for the construction of statutes to traverse from one section to another, to speculate for some reason to overrule it. If I were allowed to speculate on such a matter I should come to the conclusion that the 10th section of the Act was not intended by the Legislature to deal with such a case; but I am not prepared to rule against the decision, the very careful decision, of the Lord Chief Justice in this court, a decision which I know he is prepared to abide by. The ruling of the Court is to overrule the demurrer and allow the challenge.

*Demurrer overruled.*

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### IN THE HIGH COURT OF JUSTICE IN IRELAND. QUEEN'S BENCH DIVISION.

*Jan. 24 and 25, 1881. (a)*

(Trial at Bar before FITZGERALD and BARRY, JJ.)

REG. ON THE PROSECUTION OF THE RIGHT HON. HUGH LAW, HER  
MAJESTY'S ATTORNEY-GENERAL v. CHARLES STEWART PARNELL,  
M.P. AND OTHERS. (b)

*Conspiracy—Definition of—Injury to an individual not amount-  
ing to a crime.*

*Term conspiracy is divisible into three heads : 1st. Where the end to be attained is in itself a crime. 2nd. Where the object is lawful, but the means to be resorted to are unlawful. 3rd. Where the object is to do an injury to a third party, or a class, though, if the wrong were inflicted by a single individual, it would be a wrong, and not a crime. Per Fitzgerald and Barry, JJ.*

**I**NFORMATION by Her Majesty's Attorney-General for Ireland against Charles Stewart Parnell, M.P., John Dillon, M.P., Joseph Gillis Biggar, M.P., Timothy Daniel Sullivan, M.P., Thomas Sexton, M.P., Patrick Egan, Thomas Brennan, M. M. O'Sullivan, M. P. Boyton, P. J. Sheridan, P. J. Gordon, M. Harris, J. W. Walsh, and J. Nally.

The following was the information :

The 1st count charged that "the traversers, intending, with others, to impoverish and injure owners of farms in Ireland let to tenants in consideration of the payment of rent, did conspire combine, and confederate, to solicit large numbers of tenants in breach of their contracts of tenancy to refuse to pay, and not to pay, to the owners of farms the rents which they the said tenants were and might become lawfully bound to pay, and which the said owners might become lawfully entitled to be paid under the said contracts of tenancy, to the great damage of the said owners, and to the evil example of others in the like case offending."

The 2nd count charged that the traversers, having the like intent as that mentioned and set forth in the first count, did

(a) These dates refer to the period at which the charge was delivered and the points argued. The trial lasted twenty days.

(b) Reported by OSCAR R. ROOM, Esq., Barrister-at-Law.

unlawfully conspire, confederate, and agree to solicit large numbers of tenants to combine, conspire, confederate, and agree amongst themselves, in breach of their said contracts, to refuse and not to pay their lawful rents or contracts.

The 3rd count charged that the traversers, having the same intent as that mentioned in the first count—namely, to impoverish the owners of land—did unlawfully conspire to solicit, incite, and procure large numbers of persons to unlawfully combine, conspire, and agree together, by divers unlawful means, to deter and prevent such tenants from paying their rent, and to cause and compel them to refuse to pay to the owners of the said farms the rents that they were legally bound to pay.

The unlawful means were set forth as follows: "By threatening to cut off and utterly exclude from all social intercourse and communion whatsoever, and from all intercourse and dealings in the way of buying and selling and other business, and to shun at all times and in all places as if affected with loathsome disease, and to hold up to public hatred and contempt, and to subject to annoyance, injury, and loss, in the pursuit of his lawful occupation and industry, any and every tenant of any such farm as aforesaid who should pay to the owner thereof the rent which he the said tenant was and might become lawfully bound to pay under his contract of tenancy; to deter and prevent all the said tenants from paying, and to cause and compel them to refuse to pay to said owners of farms so let to them as aforesaid the rents which, under their said contracts, they were and might become lawfully bound to pay, to the great damage of as well the said owners of farms as also of the tenants willing and desirous to pay their said rent for the same, to the evil example of others in the like case offending."

The 4th count was similar, except the unlawful means were threatening and menacing violence and injury to the person and property of the tenant.

The 5th, 6th, 7th, and 8th counts were similar, save that the persons intended to be impoverished and injured by the acts of the traversers were described, not as owners of farms generally, as in the first count, but that class of owners who let farms at rents exceeding the valuation of such farms as valued by the Acts relating to the valuation of rateable property in Ireland commonly called the Government valuation, and also that the tenants in the counts 4 to 8 respectively were tenants of such farms, and not tenants generally.

The 9th count charged that the traversers, with others, intending to impede, hinder, frustrate, and bring into hatred and contempt the administration of justice, and execution of the writs, decrees, and orders of the courts of our said Lady the Queen in Ireland—to wit, the execution of the writs of *fieri facias* and of civil bill court decrees issued forth of the said courts of our said Lady the Queen respectively—for the levying of moneys adjudged by the said courts respectively to be due

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for rent, did amongst themselves unlawfully conspire, combine, confederate, and agree together to solicit, incite, and procure divers large numbers of the liege subjects of the Queen to conspire by unlawful means, namely, by agreeing not to buy or bid for any goods or chattels taken in execution and offered for sale according to the exigencies of the said writs and civil bill court decrees, or any of them; and, further, by threatening to cut off and utterly exclude from all social intercourse and connection, and from all intercourse in the way of buying and selling, and other business, any person who should buy or bid for any such goods or chattels so offered for sale as aforesaid, to prevent the said goods and chattels being sold for such amount of money as the sale of the said goods and chattels would but for such unlawful means reasonably produce, and thereby obstruct, defeat, and frustrate the due execution of the said writs and decrees, to the damage of the plaintiffs in the said writs, decrees, and orders, in contempt of the Courts of the Queen.

The 10th count charged that the traversers, intending to defeat, frustrate, and bring into contempt the administration of justice and the execution of writs of possession and civil bill court ejectment decrees, issued forth of the said courts for the recovery of the possession of land for the non-payment of rent, did amongst themselves unlawfully conspire and agree together to solicit, incite, and procure large numbers of persons in disregard of the execution of the said writs and decrees, and in contempt of the said courts out of which the same had issued, unlawfully to re-enter upon and retake and retain possession of the lands from which they had been removed and evicted as aforesaid, to the great damage of the plaintiffs in the said writs.

The 11th count charged that the traversers and others, intending to impoverish and injure large numbers of persons, the owners of farms in Ireland, from which any tenants had theretofore been or should thereafter be evicted in the due course of law for the non-payment of rent, and remaining unlet, did conspire and combine and agree together, by various unlawful means, to deter and prevent persons other than the person or persons so evicted from taking or occupying as tenants, and from cultivating and working for the benefit of the owners thereof, upon any of such farms.

The 12th count charged that, with the same intent—namely, of impoverishing the owners of farms from which tenants had been evicted for non-payment of rent, the traversers did conspire and combine to deter and prevent persons other than the evicted tenants from taking or occupying as tenants, or cultivating, and from working for the benefit of the owners thereof upon any such farms; and the means there mentioned are social and business excommunication.

The 14th count charged that the traversers, with the same intent, did conspire to solicit large numbers of persons to enter

into a conspiracy, by like unlawful means as in the preceding count, to deter and prevent any persons other than the persons evicted from any farm from taking or occupying such farm as a tenant.

The 15th count charged that the traversers conspired to impoverish, prejudice, and injure the landlords, being owners of farms in Ireland, from which any tenants had been evicted for the non-payment of rent, by obstructing them from letting their lands to the best advantage, by conspiring to solicit large numbers of tenants to enter into combinations, contracts, and agreements amongst themselves not to occupy as tenants any of such farms with intent by such combinations to obstruct their respective landlords in letting their lands to the best advantage.

Count 16 charged that with a like intent the traversers did conspire to solicit large numbers of tenants unlawfully to enter into combinations amongst themselves, by unlawful means, to deter and prevent any person other than the person evicted from taking or occupying any such farm; and the means are social excommunication and business excommunication.

Count 17 charged that the traversers, intending to prejudice, &c., persons who had taken or should take any farm from which any person had been evicted for non-payment of rent, did conspire to compel and coerce such persons to quit their farms so taken and occupied by them, and the unlawful means are social and business excommunication and damage.

Count 18 charged that the traversers, with the intent mentioned in the 17th count, did conspire to solicit large numbers of persons to conspire together by divers unlawful means to compel and coerce the tenants who had taken such farms to give up and quit their farms so taken and occupied by them, and the unlawful means are social and business excommunication and damage.

The 19th count charged that the traversers, unlawfully and with intent to excite and promote ill-will and hostility between landlords and tenants, did conspire to cause and create discontent and dissatisfaction between different classes of Her Majesty's subjects, and to excite and promote feelings of ill-will and hostility between landlords and tenants, and feelings of ill-will and hostility towards the landlords of Ireland amongst the rest of Her Majesty's subjects in Ireland.

**NOTE.**—The 19th count was withdrawn by the Crown and not submitted to the jury.

The traversers pleaded not guilty.

The *Attorney-General (Law)*, with him the *Solicitor-General* (W. M. Johnson), *Heron, Serj., James Murphy, Q.C., Porter, Q.C., Naish, Q.C., Constantine Molloy, and Ross*, for the Crown.

*Macdonogh, Q.C., Walker, Q.C., McLoughlin, Q.C., Peter O'Brien, Q.C., J. A. Curran, Nolan, Adams, Luke Dillon, and A. M. Sullivan*, for the traversers.

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On the nineteenth day of the trial the following charge was delivered to the jury by

FITZGERALD, J.—The second charge, as I have told you, is that of a conspiracy to incite tenants when dispossessed for non-payment of rent to retake possession by force, which is in itself a crime; for the forcible retaking of possession of that which the law awarded by its judgment is by the common law and the statute law a crime. It is one of the things provided for by what is called the Whiteboy Code, passed by the Parliament of Ireland, and re-enacted by the Parliament of Great Britain in a modified and much more temperate form, and relieving it from capital punishments with which the code was formerly disfigured. To incite persons to prevent others from taking or occupying farms from which others have been evicted for non-payment of rent is an offence at common law. Again, a combination to prevent persons buying goods taken in execution is an offence at common law, and I cannot help denouncing it as a crime if the means to carry out these incitements were those commonly known as Boycotting. Now, having dealt thus shortly with the information, let me unfold to you what the law of conspiracy is, and how it bears on the case. I shall at another stage have to advert to the class of cases of seditious libel where the law gives the decision of fact and law to the jury. But that is not the case here. The law you must receive from us, the facts you are to determine; and it is because we are to lay down the law I now proceed to unfold what that law is, and I give it, not in my own language, but that of the highest authority, the authority not alone of our Superior Courts, but of the Supreme Court of Appeal, the House of Lords of the United Kingdom. Gentlemen, you have heard adverted to in the course of this case the O'Connell trial, which commenced in 1844. Great were the issues involved in that case, but not greater than the present. Important as that case was it was not so important as the present, nor so difficult; and I have to tell you further that though the evidence was voluminous in that case it did not reach one-tenth of the evidence you are to determine on. In that great case various questions were agitated at the trial. You are aware it was afterwards canvassed in the full Court of Queen's Bench, and subsequently carried by appeal to the House of Lords. The judgment was then reversed, but though great topics were involved in the inquiry, the reversal rested on a technical ground. It may be that the counts, or some of the counts, in this information are bad in point of law, and if so it will be open to the defendants to appeal to the House of Lords. But what we have to consider here, is the law of conspiracy as laid down in the O'Connell case. In that case this law was very much discussed. The Judges of England were called in, and they were presided over by as great, as fair, and as candid a Judge as ever presided in a Court of Justice, the then Chief Justice of the Common Pleas, Tindal, C.J. He was a great

man, and remarkable for that fairness and impartiality, in fact, for that character of mind which could not but be impartial. In delivering the opinion of the judges of England to the House of Lords, Tindal, C.J., told them: "The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing." I have pointed out to you that in one at least of its objects this confederacy, if proved, was not alone illegal but a crime. Again he says, "If two or more should agree to effect by improper means something which may be in itself indifferent or unlawful." Now such is the plain language in which Tindal, C.J. lays down the law. Plain and clear, and in every word applicable to the case now before the Court. Again, in another case before the House of Lords, one of those formerly known as the Fenian cases, in which a person named Mulcahy had been convicted of the crime of treason felony, the same question was raised. He was tried at the Commission Court here, and, the conviction had, it was brought into the Court of Queen's Bench, where the decision was confirmed. A writ of error was allowed by the Attorney-General of the day to the House of Lords, and the case was fully discussed there. It became essential to discuss there what the law of conspiracy was, and the Judges were again called in. Their opinion was delivered by one now no more, but of whom we are all proud, the late Willes, J., and he, in stating the opinion of the Judges, says: "A conspiracy consists in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." By the terms illegal and unlawful it is not intended to confine the definition to an act that would in itself be a crime or an offence; but that law extends to and may embrace many cases in which the purposes of a conspiracy, if done by one only, would not be a criminal act, as for instance, if several combined to violate a private right, the violation of which would be wrongful if done by one, though not in itself criminal. If, for instance, a tenant withholds his rent, that is a violation of the right of his landlord to receive it, but it would not be a criminal act in the tenant, though it would be the violation of a right; but if two or more incite him to do that act their agreement so to incite him is by the law of the land an offence. Conspiracy has been aptly described as divisible under three heads—where the end to be attained is in itself a crime; where the object is lawful, but the means to be resorted to are unlawful; and where the object is to do injury to a third party or to a class, though if the wrong were effected by a single individual it would be a wrong but not a crime. I think under these three heads every class of conspiracy ranks. And, gentlemen, I have to declare to you that it is a criminal act, where two or more agree, to have a crime committed; where two or more agree to effectuate their object by unlawful means, or where two or more agree to do an injury to a third party or to a class, though that injury, if done

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by any one alone of his own motion, would not be in him a crime or an offence, but would be simply an injury carrying with it a right to civil remedy. No. 1, that is the first definition where the end to be obtained is criminal, speaks for itself. One at least of the charges against the defendants is that they conspired to advise that to be done which in itself was a crime, namely, forcibly to retake possession of the land which the law had awarded to the landlord. Of No. 2, the illustration commonly given—I give the illustration to enable you to understand it—is, we will say, A. B. has a right to real property, and two or three agree to support him in that right, so far their action is proper, to support him in the right which he really had. They agree to give him that support by unlawful means, that is, by the procuring of some fabricated evidence; the agreement to do that by unlawful means makes No. 2 an offence. As to No. 3 it is not inaptly illustrated by *Reg. v. Drutt* (10 Cox C. C. 592). In that case, Baron Bramwell says, “The public had an interest in the way in which a man disposed of his industry and his capital; and if two or more persons conspired by threats, intimidation, or molestation, to deter or influence him in the way he should employ his talents or his capital, they would be guilty of an indictable offence,” and he adds emphatically “that is the common law of the land.” And I tell you it is the common law of the land — if two or three agree amongst themselves—to inflict or to procure an injury to be inflicted upon a third party. In the case I have last adverted to the agreement to effect an injury or wrong to another by two or more persons is constituted an offence, because the wrong to be effected by a combination assumes a formidable character. When done by one alone it is but a civil injury, but it assumes a formidable or aggravated character when it is to be effected by the powers of the combination. And it is justly so because, though you may assert your rights against one individual, how can you defend your rights against a number of persons combined together to inflict a wrong on you. Again, there is a definition very simple in itself which is given in a book of practice, and which is applicable to the present case, Archbold’s Criminal Law. He says, “Conspiracy is an agreement of two or more wrongfully to injure a third person, or to injure any body of persons.” You see the simplicity of that, that a conspiracy is an agreement by two or more wrongfully to injure a third party, or any body of persons. And again, Mr. Roscoe, in his book on Criminal Law, sums up the result thus: “All the authorities in effect come to this, that a conspiracy is an agreement between two or more persons to do that which is unlawful, and it is unlawful to agree to accomplish an injury to a third person, or body of persons.” Some observations have been addressed to you in the course of this case, and have been often repeated, to the effect that there has been no proof given that the defendants ever met or entered into or became parties to any

agreement or confederacy or conspiracy, and that two of the defendants were not even members of the Land League. Mr. Macdonogh, in his able address, enforced this particularly. But I have now to inform you, as part of the law of conspiracy, there is no necessity that there should be express proof of a conspiracy such as that the parties actually met and laid their heads together, and then and there actually agreed to carry out a common purpose. Nor is such proof usually attempted. Again, advertng to *Mulcahy's case* (L. Rep. 3 H. of L. 306), the same great judge I have quoted (Mr. Justice Willes), says, "So far as proof goes, conspiracy, as Grose, J. says, in *Rea v. Brissac* (4 East 171), is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them." It may be that the alleged conspirators have never seen each other, and have never corresponded, one may have never heard the name of the other, and yet by the law they may be parties to the same common criminal agreement. Thus in some of the Fenian cases tried in this country, it frequently happened that one of the conspirators was in America the other in this country, that they had never seen each other, but that there were acts on both sides which led the jury to the inference, and they drew it, that they were engaged in accomplishing the same common object, and, when they had arrived at this conclusion, the acts of one became evidence against the other. As in a remarkable case at Cork, as singular and remarkable a case as ever I met with. It was a case in which two persons had been connected with the American service in the late war. One was a captain of cavalry on the southern side, and the other was a captain on the northern side. The one was a native of this country, the other a native born of America. They had been opposed to each other during the war; they had never seen each other, and amongst the documents found upon them when arrested was a letter in which one complained of violence and murder committed by the commander on the other side. These two men had never seen each other. They were arrested when they arrived at Queenstown. The one had come to take command of a brigade of Fenian cavalry, and had brought with him as his whole equipment a saddle, a pair of spurs, and two long pistols. The other was returning to Ireland, but he was alleged to be a party to the Fenian conspiracy. They were put upon trial in the same dock, upon the same indictment, and the first time they saw each other was when they stood face to face in the dock. I mention this case as illustrating that the charge of conspiracy may be well founded, even though the parties never saw each other.

*Macdonogh, Q.C.*—I think the indictment in that case was not conspiracy.

*FITZGERALD, J.*—It was a treason felony conspiracy. You will find in all the cases the overt acts were the overt

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acts of the conspirators. The agreement to effect a common object is usually an inference to be deduced by the jury, as men of common sense, from the acts of the alleged conspirators in furtherance of their purpose; and that will be your great duty upon the present case, to investigate the evidence before you. Again it has been suggested that secrecy was to some extent an essential of conspiracy, and your attention has been repeatedly called to this that the proceedings of the defendants were all above board, that they were unconcealed, that they were not carried on in the dark, and that there could be no guilty conspiracy, because it was done openly and above board. But I have to inform you in point of law that though secrecy is frequently a characteristic of conspiracy, it forms no essential element of the crime. The crime of conspiracy may be complete, though all the proceedings of the confederates have been open and above board and unconcealed. I myself, in the course of the case, called attention of counsel and you to the fact that in this case the proceedings of the alleged conspirators, at least so far as they were known to us, were open, uncloaked, and unconcealed. We have before us, and from their own hands, their printed rules and regulations, and their resolutions. They call themselves the Irish National Land League, and have their names on a brass plate on the door. Their meetings were open to the press, and they used means to give them every publicity. But notwithstanding all that, I am obliged to tell you that they may be guilty of the crime of conspiracy though their proceedings were thus open and unconcealed. The point was made and repeatedly urged in the O'Connell case. It was considered by the judges, and the learned Chief Justice, who then delivered his charge to the jury, and with the concurrence of his learned colleague overruled that point, and held that secrecy was no element in the crime of conspiracy. So I ask you to discharge from your minds altogether the argument that the proceedings of the defendants were open and unconcealed. In point of law secrecy or darkness forms no element in the crime of conspiracy. This law of conspiracy is not an invention of modern times. It is part of our common law; it has existed from time immemorial. It is necessary to redress classes of injuries which at times would be intolerable, and but for it would go unpunished. If the defendants have broken the law in the manner alleged in the information, there is no law of this land by which they could be reached but by the law of conspiracy. It has been said that this law has been in England entirely disused. But that is untrue; it is a law repeatedly put in force. It is seldom resorted to in political trials, but in a political trial such as the present, if the defendants have broken the law, their offence can only be reached by the common law indictment for conspiracy. Again, a great deal has been said in the way of illustration as to conspiracy to effect objects which would not be criminal in themselves, and you were above all referred to the



action of trades' unions. But the action of trades' unions which is now regulated by statute is totally and essentially different from the charge which is here made against the defendants. Workmen may agree in common not to work unless they are paid certain prices. The same in the case of the employers of labour. They may agree not to take men into their employment unless at certain rates, and they are free to do that. But see how different the circumstances are. A man or a body of men may say "We won't give our labour unless we are paid in a certain way," or a body of employers, "We cannot give employment profitable to ourselves unless you work at a certain rate." How different to the case before us, for the combination alleged here is an agreement to incite farmers who have agreed to pay certain rents, not to pay them, and not alone not to pay the rents which they have contracted to pay, but to keep the farms by force, and against the law of the country. There is no analogy between the two cases. One does not bear at all upon the other, and I ask you to dismiss that illustration from your mind. Now, gentlemen, I have done with this important law of conspiracy.

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The learned Judge having completed his charge to the jury (the remaining portions of which are immaterial for the purposes of this report), the jury retired.

*Macdonogh*, Q.C., for the traversers.—I object to the third statement of your Lordship in relation to conspiracy. The vagueness of the second and third of these propositions leaves so broad a discretion in the hands of the Judge that it is hardly too much to say that plausible reasons may be found for declaring it to be a crime to combine to do almost anything which the Judges regard as morally wrong, or politically or socially dangerous. I think that when the third division of the heads of conspiracy which your Lordship gave and enunciated to the jury, comes to be considered, it amounts to this that an innocent act, if agreed to be done by two or more persons would virtually become a guilty conspiracy.

FITZGERALD, J.—I laid down no such proposition.

*Macdonogh*, Q.C.—No, but the jury may so understand it. I beg leave to say that the inevitable result of what your Lordship stated on the subject would be this, that if men concerted together to commit a civil trespass that would be conspiracy. I submit that Lord Ellenborough's doctrine is right, and Lord Campbell, C.J.'s decision, when properly considered, does not conflict with it, and that it is not the law that parties can be indicted for conspiracy to commit a civil trespass. In the present indictment there is no charge of any conspiracy or any intention to injure an individual *eo nomine*. So the doctrine of private conspiracy against particular persons is wholly inapplicable to the present case. In *R. v. Turner* (13 East, 281) Lord Ellenborough says: where reference was made to *R. v. Spragge and others* (2 Burr.



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993) : "That was a conspiracy to indict another of a capital crime, which, no doubt, is an offence. And the case of *R. v. Eccles* was considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public. But I should be sorry that the cases in conspiracy against individuals which have gone far enough, should be pushed still further. I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground—in other words, to commit a civil trespass—should be thereby in peril of an indictment for an offence which should subject them to infamous punishment." And a rule absolute to set aside the verdict was granted. No doubt it is reported that Lord Campbell expressed himself in *R. v. Rowlands* (17 Q. B. 686) : "And as to *Turner's case*, I have no doubt whatever that it was wrongly decided," but he certainly gives no reason for that. On the contrary, he immediately afterwards shows that under particular circumstances that might be an offence which would not be an offence if it merely rested on their intent to commit trespass. But I insist that the commission of a civil trespass ought never to be regarded as forming a groundwork for an indictment for conspiracy ; and to the present case it is highly inapplicable to apply those cases to which my learned friend, the Attorney-General, did simply and entirely refer, such as *Reg. v. Druitt* (10 Cox C. C. 593.)

BARRY, J.—With reference to the first, the main branch of the objection to the charge by Mr. Macdonogh, I am of opinion that he has the remedy of appeal by writ of error if anything erroneous has been stated, and I am of opinion as to the charge of my learned brother, as to the manner in which he has laid down the law of conspiracy, every objection to that charge appears on the record ; and to say that the charge is objectionable is, in other terms, to say that the information is vicious on the face of it. The law of conspiracy in late years has undergone very considerable alteration, especially with reference to trade unions in England, and the consideration of the subject was referred to a very remarkable commission indeed. The president of that commission was the late Lord Chief Justice Cockburn, a lawyer, I need scarcely say, of the greatest eminence ; and certainly I may say of him he was not a Judge who would be inclined at all to take a limited or unpopular view of such a subject. Another member of that commission was Lord Winmarleigh ; the next was Mr. Bouverie, of whom everybody who knows him will say that a more constitutional statesman, and I believe lawyer, does not exist in England. The next was Mr. Russell Gurney, late Recorder of London. The next was a member of the Judicial Committee of the Privy Council, Sir Montagu Smith. The next was Mr. John A. Roebuck. The next was Mr. Thomas Hughes, member of Parliament ; he could hardly be regarded as in any way likely to abridge popular privileges. Then there was Mr. Gabriel Goldney, a legal member of the House of Commons. That is the commission who reported on this law of conspiracy,

and in their second report the following exposition of the law of conspiracy was given (see p. 520). Of course, it has not the binding authority of a court of co-ordinate jurisdiction upon us. Still, coming from such a source, it must be regarded as a highly authoritative statement of the law. It would seem that two extreme opinions were put forward as to the law on this point, and that is not a matter of surprise when politics become more or less involved in the legal controversy. The one proposition was that an act perfectly innocent in itself, if it be carried out by perfectly innocent means, might, if two or more persons combined to carry it out, become criminal. The other was the proposition I understand Mr. Macdonogh to put forward now as his contention in this case, namely, that there could be no indictable conspiracy unless the thing to be done or the means by which the thing was to be done were in themselves criminal; that would constitute a crime and be the subject-matter of an indictment for a prosecution. Now, as to the first of these propositions, I do not think it necessary to discuss it further (I do not think it has any application to this case) than to say I should be very slow to adopt such a view of the law. I think there must be necessarily in the law of conspiracy considerable vagueness and uncertainty, which in many respects is contrary to our law, and I agree with Mr. Macdonogh that it should be administered with very great care, and not extended beyond the limits it has gone; therefore, if I had to pronounce a definite opinion I should be clearly of opinion that a combination to do an act innocent in itself by innocent means does not constitute an indictable conspiracy. As regards the second proposition, however, which has been so often mooted, namely, that the thing to be done must be criminal, or the means to be used must be criminal. With reference to that I am not prepared to adopt that view of the law, because I think the weight of modern authority is against it. I shall not refer any further to the cases cited by my brother Fitzgerald, and again referred to by Mr. Macdonogh; but I shall now read this very lucid exposition of the law of conspiracy laid down by that most distinguished commission, a commission deserving, in the sense in which Mr. Macdonogh would put it, a greater amount of popular confidence than the decision of a mere court of lawyers, and presided over by so distinguished a man as the late Lord Chief Justice Cockburn: "The law protecting the relation of master and servant, employer and employed, from interference by third parties is supplemented by the common law relating to conspiracy. This law becomes applicable not only where two or more persons combine to do any act which is in itself an offence, and would be criminal if done by any one of them, but also in many instances in which the act which is the purpose of the conspiracy, if done by one, would not be criminal; as for instance, where several, with the malicious intention to injure, combine to violate a private right, the violation of which by a single individual, though not criminal,

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would be wrongful, and would give a right of civil action to the party aggrieved. We are directed to consider whether it is desirable to limit or define this law either generally or as affecting the relation of masters and workmen." He then goes on to say, "Conspiracy may be divided into three classes: first, where the end to be accomplished would be a crime in each of the conspiring parties, a class which offers no difficulty. Secondly, where the purpose of the conspiracy is lawful, but the means to be resorted to are criminal as where the conspiracy is to support a cause believed to be just by perjured evidence. Here the proximate or immediate intention of the parties being to commit a crime, the conspiracy is to do something criminal, and here again the case is consequently free from difficulty. The third and last case is where with a malicious design to do an injury, the purpose is to effect a wrong, though not such a wrong as when perpetrated by a single individual, would amount to an offence under the criminal law. Thus, an attempt to destroy a man's credit, and effect his ruin by spreading reports of his insolvency would be a wrongful act which would entitle the party whose credit was thus attacked to bring an action as for a civil wrong, but it would not be an indictable offence. If it be asked on what principle a combination of several to effect the like wrongful purpose becomes an offence, the answer is, upon the same principle that any other civil wrong, when it assumes a more aggravated and formidable character, is constituted an offence, and becomes transferred from the domain of the civil to that of the criminal law. All offences, it need hardly be observed, are either in their nature offences against the community, or are primarily offences against individuals. As regards the latter case, every offence against person or property, or other individual right involves a civil wrong, which would have entitled the person injured to civil redress were it not that owing to the aggravated nature of the wrong and the general insecurity to society which would ensue from such acts, if allowed to go unpunished, the State steps in, and merging the wrong done to the party immediately interested in the larger wrong done to the community, converts the wrong done by the infraction of individual right into a crime, and subjects the wrong doer to punishment to prevent as far as possible the recurrence of the offence. Thus the dividing line between private wrongs, as entitling the party injured to civil remedies, and private wrongs thus converted into public wrongs, in other words into offences and crimes, is to be found in the more aggravated and formidable character which the violation of individual rights under given circumstances assumes. It is upon this principle that the law of conspiracy, by which the violation of private right, which if done by one, would only be the subject of civil remedy, when done by several is constituted a crime, can be vindicated as necessary and just. It is obvious that a wrongful violation of another man's right committed by many assumes a far more formidable and offensive character than when committed

by a single individual. The party assailed may be able by recourse to the ordinary civil remedies to defend himself against the attacks of one. It becomes a very different thing when he has to defend himself against many combined to do him injury. To take the case put by way of illustration, that of false representations made to ruin a man's business by raising a belief of his insolvency, such an attempt made by one might be met and repelled. It would obviously assume very different proportions, and a far more formidable character if made by a number of persons confederated together for the purpose, and who should simultaneously and in a variety of directions take measures to effect the common purpose. A variety of other instances, illustrative of the principle, might be put. The law has therefore, and it seems to us wisely and justly established that a combination of persons to commit a wrongful act with a view to injure another, shall be an offence, though the act if done by one would amount to no more than a civil wrong. We see no reason to question the propriety of the law as thus established, nor have we any reason to believe that in its general application it operates otherwise than beneficially." It seems to me that that is an extremely lucid and able exposition of the law coming from a most authoritative source. If that law be erroneous as there laid down, if it should be found objectionable on public or political grounds, it is for the Legislature to interfere. At present I do not think this Court has authority to interfere.

FITZGERALD, J.—I would only add to what my learned brother has said, as the objections were very much an appeal from what I have said, I entirely concur in what he has said.

The Jury were unable to agree, and were discharged.

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## HIGH COURT OF JUSTICE.

## QUEEN'S BENCH DIVISION.

(Before Lord Chief Justice COCKBURN and a Special Jury.)

December 20, 1880.

REG. v. JACOBSON (a)

*Burial ground—Unconsecrated—Disinterring—Disturbing and removing human remains—Misdemeanour.**Defendant was indicted for unlawfully, wilfully, and indecently digging open graves in a burial ground, and taking and removing parts of the bodies of persons buried therein, and interfering with and offering indignities to the remains of the said bodies.**The evidence showed that defendant employed persons to excavate for building operations, the burial-ground attached to a Nonconformist place of worship, which had been disused as a burial-ground for some time; and the jury found that, in the course of the excavations, bones that formed parts of human remains, and of the same human skeleton, were dug up, but that they were not disturbed in an improper and indecent manner.**Held, that the defendant was guilty of a misdemeanour at common law.*

THE CENTRAL }  
CRIMINAL }  
COURT. } The jurors for our lady the Queen upon their oath present, that heretofore and before the taking at this inquisition there was a certain burial-ground in the parish of St. Pancras in the county of Middlesex, and that the bodies of certain persons, whose names to the jurors aforesaid are unknown, were from time to time buried in the said ground, and, at the time of the committing of the offence hereinafter charged and stated, large portions of the said bodies remained, and were in the said ground; and the jurors aforesaid upon their oaths aforesaid do further present that Nathan Woolf Jacobson, on divers days between the 21st day of March, A.D. 1880, and the taking of this inquisition within the jurisdiction of the said court, well knowing the premises, did unlawfully, wilfully, and indecently, dig open, or cause and procure to be dug open, certain graves in the said burial-ground wherein had been buried the said bodies as aforesaid, and did then and there unlawfully, wilfully, and indecently take out, and cause and procure to be taken out, of the said graves certain portions of the said bodies, and did then and there unlawfully, wilfully, and indecently interfere with and offer indignities to the remains of the said bodies, and did then and there unlawfully, wilfully, and indecently remove from the said graves certain portions of the said bodies so buried as aforesaid, to the great scandal and disgrace of religion, decency, and morality, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Second Count.*—And the jurors aforesaid upon their oath aforesaid do further present that the said N. W. Jacobson, on the 30th day of March, A.D. 1880, and within the jurisdiction of the said court, unlawfully, wilfully, and indecently, did dig open certain graves in the burial-ground in the 1st count mentioned, and unlawfully, wilfully, and indecently, did remove from the said graves certain portions of the bodies of certain persons whose names to the jurors aforesaid are

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

unknown, the said bodies having been theretofore buried in the said graves, to the great scandal and disgrace of religion, decency, and morality, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

*Third Count.*—And the jurors aforesaid upon their oath aforesaid do further present, that the said N. W. Jacobson, on divers days between the 24th day of March, A.D. 1880, and the taking of this inquisition within the jurisdiction of the said court, was the occupier of the said burial-ground in the said court mentioned, and that he did then and there unlawfully and injuriously cause and suffer certain persons, whose names to the jurors aforesaid are unknown, to unlawfully and indecently mutilate and offer indignities to portions of the bodies of certain persons whose names to the jurors aforesaid are unknown, and who had been theretofore buried in the said burial-ground, to the great damage and common nuisance of all liege subjects of our lady the Queen in the vicinity of the said ground inhabiting, being, going, returning, and passing, and against the peace of our lady the Queen, her crown and dignity.

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The indictment, having been preferred and found at the Central Criminal Court, was removed into the Court of Queen's Bench by *certiorari*.

The trial took place on the 30th day of June, 1880, at Westminster, before Cockburn, C.J., and a special jury.

The material facts were these: About the year 1756 the celebrated Nonconformist preacher, Whitfield, built a chapel, known as the Tabernacle, in Tottenham-court-road, London; and attached to it was a burial-ground of about half an acre in extent. The chapel and land were held on a lease, which expired in 1827, and no portion had been consecrated. From the register it appeared that the first interments in the ground took place in November, 1756, and the last in 1853. From 1827 to 1831 no burials took place, but, in the latter year, the chapel trustees bought the copyhold of inheritance, and burials were again resumed. The trustees borrowed the purchase-money, and mortgaged the chapel and ground to secure the same. From 1756 to 1853 there had been about 30,000 interments in the ground. In 1862, the mortgage was foreclosed, and the chapel and ground sold in separate lots. The land was advertised by the auctioneer as building land, and the sale was by direction of the Court of Chancery. The defendant bought the ground at the sale, and in 1863 he began to excavate, with a view to building on it. The vestry of St. Pancras thereupon took out a summons against him, under the 20 & 21 Vict. c. 81, s. 25, which provides that, except in the case where a body is removed from one consecrated place of burial to another by a faculty, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial, without license under the hand of a Secretary of State—penalty, on summary conviction, not exceeding 2*l*. The defendant was thereupon convicted at the Marlborough Police Court. In 1879, the ground, through neglect, was invaded by street boys, and became a disgrace to the neighbourhood; and the vestry, at the solicitation of near inhabitants, repaired the railings and fences, and endeavoured to plant and improve it, in pursuance of the order of the Secretary of State, made under the 20 & 21 Vict. c. 81, s. 23. Upon this the defendant obtained an injunction from the Master of the Rolls to restrain the Vestry



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from interfering, the Master of the Rolls being of opinion that the Burial Acts did not apply to grounds like this one, and that the Order in Council was therefore of no authority. Shortly afterwards the defendant laid before the Metropolitan Board of Works plans for the erection of buildings on the ground, but the board refused to sanction the plans unless the ground was first excavated down to the virgin soil. The defendant then consulted Dr. Rogers, a Professor of Chemistry and Toxicology, who advised him that no injury would ensue to the public health from excavating the ground. Having obtained this opinion, the defendant proceeded with the excavation of the ground. The Vestry then laid another information against the defendant at the police court, and the defendant was bound over to take his trial at the Central Criminal Court for a misdemeanour. The indictment was preferred and found and removed into the Court of Queen's Bench for trial by a special jury. The defendant pleaded not guilty.

It was proved that the defendant employed a contractor of the name of Cousens to excavate the ground, and the contractor employed a number of men who dug out of the ground a number of human bones which had not become decomposed, and also the remains of coffins. About a hundred cartloads of the mould were removed, some being sold to florists at 2s. to 3s. per load. One witness said that he saw skulls picked out of the ground with a pickaxe. Another witness, the survivor of a family that had been buried in the graveyard, gave evidence as to the manner in which the human remains had been removed by the contractor. One of the workmen employed deposed that the workmen picked up the bones sometimes with their hands and sometimes with their shovels, and placed them in a temporary trench prior to their removal to a vault which was being made for their reception, and that a man was placed to see that no human bones were carried away in the carts. Doctors Rogers and Richardson were called on behalf of the defendant to prove that the decomposition of the remains was complete and that there was no appearance of organic matter and no offensive odour.

The Lord Chief Justice, in summing-up, said the point had been raised whether the disinterring of such bones as had been proved to have been disinterred was an offence at law, and although he had his own opinion upon that point he would ask the jury, with the view of obtaining the opinion of the court—there not being any judicial decision on the subject—whether the bones were, in their opinion, those of human remains. In a churchyard there might be bones, some of which belonged to one human body and some to another not in immediate proximity; and in such cases he doubted whether their removal would bring the case within the law. He would therefore put it to the jury whether, in their opinion, those bones ever formed part of the same human body. If they were of opinion that they were human remains, and as such, entitled to the protection of the

law, then came the most material question: Assuming that the defendant was warranted in disinterring them, was it done in such a manner as not to be improper and indecent? It had been laid down by the late Mr. Justice Byles that "indignities offered to human remains in improperly and indecently disinterring them are the grounds of an indictment." Further, as to the first question, were these human remains those constituting the same body, and forming one integral skeleton? It was shown that in the course of 100 years more than 30,000 bodies had been interred in the burial ground, and they could quite understand that as it became necessary to open fresh graves from time to time, there must have been some dispersion of bones and disturbance of bodies, but it was also obvious that those who came last must remain uppermost, and as there was no operation in nature which could remove one part of the human structure from the other, the bones must still be found in their original position as a corpse, and when disturbed by a pickaxe or shovel, the jury could not doubt that those in the uppermost layer were the bones which formed the same skeleton which had heretofore formed the same body and had been interfered with and disturbed. He would ask them further to find—and this was the most important branch of the case—was the removal of the bones improperly and indecently done? Undoubtedly the defendant had bought the freehold, but then he had done so subject to the duties imposed on its trustees, and no law could justify a man in removing the remains of the dead from their proper resting-place improperly and indecently. Assuming that the defendant had the right to remove them, he had no right to do so irreverently and indecently. Putting to them a supposititious case, he would ask the jury if any of them, having relatives interred in a burial ground, would be satisfied by their removal in such a manner as had been proved in this case, though no doubt the men employed, as honest men, had done their best. His Lordship, in conclusion, handed the three questions in writing indicated in his remarks to the jury, namely: First, were the bones that were disinterred those of human remains; secondly, did they form the bones of the same skeleton? and, thirdly, were they disturbed in an improper and indecent manner?

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The jury answered the first two questions in the affirmative and the third in the negative.

A verdict of guilty was entered upon the record, and the Lord Chief Justice reserved the legal question for further consideration.

*Dec. 20.*—The defendant came before the Court for judgment when the legal question was discussed.

*Webster, Q.C.* (*Bullen* with him) for the defendant.—The facts as proved shewed that the defendant had not committed any criminal offence, for at the time of the alleged commission this land, which was unconsecrated ground, was not *de facto* or *de jure* a burial ground. It is not an offence against the common law of

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England if an owner of land wherein persons have been buried remove the bodies, provided he does so properly and decently. In this case the remains were unrecognisable. In *Foster v. Dodds* (L. Rep. 3 Q. B. 67) which was an action, for trespass, by the owner of land formerly used as a burial ground attached to Bride-well, Bridge-street, Blackfriars, against the churchwardens of the parish of St. Bride, Fleet-street, who had entered upon the ground and done the acts complained of under an order of the Secretary of State made under the Burial Acts, 20 & 21 Vict. c. 81, s. 23, and 22 Vict. c. 1, s. 1, Byles, J. said. "A dead body by law belongs to no one, and is therefore under the protection of the public. If it lies in consecrated ground, the ecclesiastical law will interpose for its protection; but whether in ground consecrated or unconsecrated, indignities offered to human remains in improperly and indecently disinterring them are the ground of an indictment." Here it is found by the jury that the remains were not disinterred in an improper or indecent manner. This is a different case from *Reg. v. Sharpe* (7 Cox, C.C. 214; 26 L. J. M. C. 41) where it was held that it was indictable to remove, without lawful authority, a corpse from a grave in a burial ground belonging to Protestant dissenters. There the defendant removed several coffins out of a family grave, and took away that of his mother, which was much decomposed, after placing it in a shell, and reburied it in a consecrated churchyard. In that case the removal was without the assent of the owners of the soil. and was done in an improper manner. In this case the remains had become pulverised and mixed with the soil, and there was nothing that could be recognised as belonging to any particular grave or coffin or skeleton. The protection at common law to bodies interred in unconsecrated ground is against the indecent disinterment of them, and the disinterment must be with the assent of the owner of the ground.

*Poland* (Mead with him).—The evidence shows that the defendant has been guilty of an offence at common law. The offence consists in opening divers graves and taking out parts of whole skeletons, so that they ceased to be whole skeletons, and separating the bones and mixing them up with the mould, so as to destroy the identity of the skeletons. That is an offence *contra bonos mores*, and revolting to human nature, as was said in *Rex v. Lynn* (2 T. Rep. 733; 1 Leach C.C. 497), where it was held to be an indictable offence to take up a dead body for the purpose of dissection. It is no answer to say that the disinterment was done in a decent way, any more than it would have been to say that in *Rex v. Lynn* the disinterment was for the advancement of medical science. In the present case it was proved that persons now living had relatives buried in this ground. In *Reg. v. Sharpe* there was a trespass for want of the consent of the owner of the ground, but that does not constitute the offence at common law, which is the disinterment, the disturbance of the remains of the dead. A time may come when

the bones are not recognisable as human remains, when the bones have become dust and the ground might be built upon. To disturb the remains of Druids who had been buried on Salisbury Plain, for instance, would not be indictable. This must always be a question of degree, and the same rule would not be applicable if the remains were in such a state that their removal would be a shock to our moral feeling. The defendant cannot lawfully disinter bodies recently buried and place them in a common vault, even if decently done. In *Reg. v. Sharpe*, Erle, C.J., said, "We have considered the grounds relied upon on behalf of the defendant, and, although we all feel sensible of the estimable motives on which the defendant acted, namely, filial affection and religious duty, still, neither authority nor principle would justify the position that the wrongful removal of a corpse was no misdemeanour if the motive for the act deserved approbation. A purpose of anatomical science would fall within the category. Neither does our law recognise the right of any one child to the corpse of its parent as claimed by the defendant. Our law recognises no property in a corpse, and the protection of the grave at common law as contra-distinguished from ecclesiastical protection to consecrated ground depends on this form of indictment, and there is no authority for saying that relationship can justify the taking of a corpse from the grave where it has been laid."

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FIELD, J.—The defendant has been convicted of the offence charged in the indictment, and we are of opinion that what the defendant has done, he being present at the time, and having told the inspector of nuisances that he would be responsible for what was done, is an offence by the common law of England. In my opinion it is an offence of a very serious nature that the remains of human beings who had gone to their rest should be disturbed and subjected to indignities, although the defendant was entitled to credit for doing what he did in a manner that seemed to him most proper. It was true that he had consulted a medical gentleman whose opinion he thought warranted him in commencing the excavations. But when he saw human remains disinterred, he should have paused and desisted, instead of which he persisted, and sheltered himself under the responsibility of his professional adviser. On the other hand, I acquit him of all intention of desecration or hurting the feelings of others, and moreover he may have thought that the conditions under which he bought the land at a sale by order of the Court of Chancery carried with them a sort of sanction for what he was doing, and as a layman he might have supposed that the land which he had purchased was available for building purposes. It is also in favour of the defendant that since the trial he has abstained from further disturbance of the remains, and the court would further take into account that he would have to pay the expenses of the prosecution. Lastly, the prosecutors, the vestry of St. Pancras, had expressed the wish not to press the case against the defendant,

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but to leave it entirely in the hands of the Court. The Court, however, desired to prevent the repetition of offences like these, but under all the circumstances, and as an indulgence to the defendant on the distinct understanding that this serious offence should not be repeated, would only impose a penalty of 25*l*.

MANISTY, J.—I agree with my learned brother, and I desire that it should be understood that there is no doubt as to the question of law in this case. In my opinion the freeholder was bound when he originally disposed of the land for a burial ground to see that it was preserved for interments only, and that the bodies of persons buried there should not be disturbed, and I also think that each one who succeeded took the ground under the same obligation.

*Conviction affirmed.*

## NORTH WALES CIRCUIT.

CARNARVON WINTER ASSIZES.

*Monday, January 17, 1881.*

(Before Mr. Justice FRY.)

REG. v. JOHN WILLIAM JONES. (a)

*Practice—Restitution—Stolen Property—Post-office.*

*The Postmaster-General is not entitled to have restored to him moneys found on the prisoner part of the proceeds of the theft, the prisoner having pleaded guilty to an indictment for stealing a letter containing two bank notes the property of the Postmaster-General.*

THE prisoner pleaded guilty to an indictment under the Post Office Act (7 Will. 4 & 1 Vict. c. 36) which charged him with stealing, while in the employment of the Post Office, a post-letter containing two Bank of England 10*l*. notes. There was no count for a simple larceny. The Postmaster-General was the prosecutor, and the property was laid in his name.

*Trevor Parkins*, instructed for the prosecution, applied that a sum of 7*l*. 9*s*. 6*d*., part of the proceeds of the theft, which was in the hands of the police, should be handed over to the Postmaster-General. He relied upon sect. 100 of 24 & 25 Vict. c. 96

(a) Reported by CLEMENT HIGGINS, Esq., Barrister-at-Law.

(the Larceny Act), and contended that the compound larceny of which the prisoner had been convicted comprised the offence of simple larceny, and that the case accordingly fell within the words of that section, viz., "any such felony as is mentioned in this Act in stealing." He pointed out that the prisoner might under the indictment have been convicted of a simple larceny if the circumstances of aggravation which brought the offence within the terms of the Post Office Act had failed to be proved.

FRY, J.—I think I have no power to make an order. Before I can do so it must be shown that the prisoner was indicted for such an offence as is specified in the Act 24 & 25 Vict. c. 96, and convicted thereof. I will, however, if you like, adjourn my decision till I return to London; and you can then, if you are able to do so, bring before me any authority which extends the construction of this section so as to comprise such cases as the present one. There seems, however, to be a further difficulty. The section provides that the property is to be restored to the owner, and it is not clear that the Postmaster-General is the owner.

*Trevor Parkins* said it was a case of great hardship. The sender of the bank-notes had no remedy against the Post Office. If the money were handed over by the police to the Postmaster-General it would be given to the sender. The police had no right to keep the money, and if an intimation of his Lordship's opinion were made they would no doubt act upon it.

FRY, J.—I think the money ought to be returned by the police, although I cannot order them to do so.

*Application refused.*

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### HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*February 2, 1881.*

(Before MAY, C.J., O'BRIEN and FITZGERALD, JJ.)

REG. v. STEPHEN BUTLER AND OTHERS. (a)

*Bail—Serious nature of offence charged—Probability of defendant not appearing at trial—Defendant belonging to an association which might advance funds to indemnify bailsmen in case of defendant absconding.*

*Where defendants, who were members of an extensive organisation, were accused of a riot arising out of the agitation created by the said organisation, bail was refused by the local magistrates.*

*Held (per May, C.J. and Fitzgerald, J., dissentiente O'Brien, J.), that the defendants should not be admitted to bail, considering first, the serious nature of the offence charged; secondly, the probability of the association of which the defendants were members furnishing them with funds to indemnify the bailsmen in case of default on the part of the defendants.*

**A**PPPLICATION on the part of Stephen Butler and others, to be admitted to bail.

The facts of the case as appeared from the depositions were as follows: A man named Long, in 1851, gave up a farm he held under Major Armstrong. Long owed at the time 231*l.* rent, he was forgiven all arrears of rent, and allowed to remove his crops. The farm was then thrown into the demesne of Major Armstrong. Long left a daughter surviving him, his death took place about seven or eight years before the present proceedings. On the 1st day of January, 1881, the following notice was publicly posted in the neighbourhood of the said farm:

Irish National Land League.

At a meeting of the Committee of Holycross Branch Irish National Land League, held at Holycross, on Thursday, the 30th day of December, Stephen Butler, Esq., in the chair, the following resolutions were unanimously adopted:

That we, the Committee Holycross Branch National Land League, do look upon

(a) Reported by CHAS. R. ROCHE, Esq., Barrister-at-Law.

all parties who propose for, or take grass on the farm belonging to Michael Long, of the Grove, as traitors to the country, inasmuch as the daughter of said Michael Long is anxious to come into possession of her father's place.

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On the 2nd day of January, 1881, the defendants and a crowd of persons came to the farm on horseback, wearing green sashes. Two bands of music were present, and marched round the fields which formed the said farm, and alternately drummed while the mob cheered. About four o'clock in the evening, as the mob passed Farney Castle (the residence of the widow of Major Armstrong, the former landlord of the farm, and at present in possession thereof), they continued drumming, baaing (*sic*), shouting, hooting, and cheering. The mob, consisting of some hundreds of persons, formed a semicircle round the house, and continued their riotous behaviour. The defendants were subsequently committed for trial on a charge of riot, bail being refused.

*H. Lover*, for the defendants.—In this case there is no doubt that substantial bail will be forthcoming. There is no doubt that the defendants will appear to stand their trial. In the case of aailable misdemeanour, bail, if otherwise sufficient, ought not to be refused on account of the personal character or opinions of the parties proposed: (*Reg. v. Badger*, 4 Q. B. 468.)

*Ryan*, Q.C. (with him *Naish*, Q.C.), for the Crown, relied on *Reg. v. M'Cormick* (17 Ir. C. L. 414), where it was held that where the depositions make out a *prima facie* case of felony against the prisoners, and show a state of things which indicates that the prisoners enjoy a large amount of sympathy and support from the public, the Court will not be influenced on an application to admit to bail, by the fact that the prisoners are able and ready to procure bail. That was a case against defendants who were members of the Belfast Ship Carpenters' Organisation, a far smaller and less influential one than the present association of the Land League. They relied on *R. v. Oallagher* (7 Ir. C. L. R. 19; *R. v. M'Oartie*, 11 Ir. C. L. R. 188; *Reg. v. Carden*, 6 Cox C. C. 484).

*MAY*, C.J.—I for one am of opinion that the application to admit these prisoners to bail ought to be refused. In cases of this nature two matters are in general material to be considered. One is the cogency of the evidence against the accused, another is the gravity of the offence charged, and from these two elements the probability or improbability of the traversers appearing to take their trial may be deduced, the more cogent the evidence, the more serious the consequences of conviction, the greater the probability that they may not appear to take their trial. With regard also to the dependence to be placed on the taking bail as ensuring the appearance of the accused, cases have been referred to which afford guidance to the court. Where the offence charged has appeared to be the result of a widespread organisation or conspiracy and it appears probable that if the securities given should be forfeited, the bail would be indemnified out of funds sub-

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scribed by the body of which the traversers are members, the Court has regarded security by bail unreliable, and therefore refused to admit the traversers to bail. It appeared that some thirty years ago a man named Long was in possession of a farm, and under circumstances of considerable consideration shown to him by his landlord, Major Armstrong, this farm was given up, and was made part of the demesne of that gentleman. There was nothing more about it for thirty years, and then a body calling themselves the Land League at Holycross, passed a resolution that any person who took grass from that land should be deemed a traitor to his country—and for what reason? Because “the daughter of the former tenant was anxious to obtain possession.” At the meeting which passed that resolution Mr. Stephen Butler, one of the defendants, presided. It was passed on the 31st day of December, and posted in the neighbourhood, and two days afterwards simultaneously from various parts of the country bodies of men assembled, some of them on horseback and others on foot, accompanied with bands of music, and made their way forcibly into the demesne of Mrs. Armstrong, the widow of the former landlord of the farm. They then proceeded to the mansion, which was surrounded by this riotous mob, violence being prevented by the police who were present. What was the object of this proceeding? Manifestly to strike terror into the mind of this lady, and to induce her to restore this piece of property to the daughter of the former tenant. It appears to me that an assemblage like this comes within the meaning and actual language of the Whiteboy Acts, and if it does it involves very serious consequences. Again, the evidence appears to be singularly cogent. Every one of the defendants were identified as having taken part in the riot. It also appears that the whole of this transaction was the result of an extensive and widespread conspiracy. We cannot shut our eyes to the fact that there is in the country a body called the Land League, having under its control very large funds, and acting in concert in order to obtain certain objects. In this case, the local magistrates, in the exercise of their discretion, have refused bail. I do not say that that discretion should never be interfered with; as a matter of fact it often is, but under all the circumstances of the present case, and having regard also to the suggested possibility that the traversers might use their influence with the jurors, and perhaps also with the witnesses, if they were at large, I think the safer course and sounder conclusion is not to admit these traversers to bail.

FITZGERALD, J.—I cannot help concurring with the Lord Chief Justice that this motion should be refused. There is no difference of opinion between the members of the Court as to the principles which ought to regulate them in regard to it. As to the enormity of the offence charged in the present case there can be no question, especially as regarded the person called “Stephen Butler, Esq.” The resolution which has been read was one

emanating from a meeting of the Land League, and it proclaimed to the world as traitors to their country all persons who would propose for or take a grass farm belonging to Michael Long. They were proclaimed as traitors to their country. We have already held in this court, and proclaimed to the public at large, that Mr. Stephen Butler, and all those who combined with him at that meeting to pass that resolution, were, irrespective of anything that took place afterwards, guilty of a grave misdemeanour at common law. It represented a combination to injure third parties, namely, this Mrs. Armstrong. Upon that resolution there is no question, and when we look back to see why the parties who interfered with this farm were to be regarded as traitors to their country, the facts presented are such that I think the Lord Chief Justice was quite correct in saying that he was surprised to find them even in Ireland, and certainly it was a state of facts which would not be equalled in any part of the civilised world save Ireland, if Ireland is at present to be called civilised. A farm had been in possession of Major and Mrs. Armstrong for thirty-one years, and while the case was going on, I was going to ask Mr. Lover whether there was any Statute of Limitations in relation to this matter. All the actors were dead and gone save the bailiff, who was able to tell the circumstances; and yet "Stephen Butler, Esq.," and those who acted with him, said that any one would be a traitor to his country who would take the farm, and the reason given was that a descendant of the tenant was in existence who wished to be restored to it. The facts as disclosed in the depositions showed a state of things calculated to strike a far heavier blow at the peace and prosperity of the country than anything that occurred in the Belfast Carpenters' case. In that case two riotous bodies assailed each other, and fought it out. In the present case the action of the defendants struck at all property and all society. There is no doubt that supposing what was stated in the informations to be proved, and that the jury believed the witnesses, and that the facts were not explained, the case is such as would warrant a common jury in finding a verdict of guilty. There is no doubt that the offence is one coming within the meaning of the White-boy Acts. There only remains the further proposition, is there danger that if these parties should be released they would not appear to take their trial. I adopt the principle laid down in the Belfast case, which *à fortiori* applies to the present. In the Belfast case the combination was local only; but yet it was said that if it was thought worth while local combination would easily provide the necessary amount to indemnify the persons giving bail. The present case is much stronger, for it is not merely a local organisation, but an organisation throughout the entire country, and with an offence of this enormous character, if it should be thought necessary that the parties should not appear, no matter what might be the amount of the bail imposed, it would be subscribed for. I therefore come to the conclusion

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that the magistrates have exercised a wise discretion in refusing bail.

O'BRIEN, J. dissented on the ground of there being no reasonable doubt that the defendants would appear to take their trial if bail were accepted.

## HIGH COURT OF JUSTICE.

SITTINGS AT WESTMINSTER.

December 7 and 8, 1880.

(Before Lord SELBORNE, L.C., BAGGALLAY, and BRETT, L.JJ.)

MULLINS v. THE TREASURER OF THE COUNTY OF SURREY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Conveyance of prisoners to prison—Liability for expense—Prison Act, 1877 (40 & 41 Vict. c. 21), ss. 4, 57.*

*By the Prison Act, 1877 (40 & 41 Vict. c. 21), s. 4, "All expenses incurred in respect of the maintenance of prisons to which this Act applies, and of the prisoners therein, shall be defrayed out of moneys provided by Parliament."*

*By sect. 57, "The maintenance of a prisoner includes all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would, if this Act had not passed, have been payable by a prison authority."*

*The plaintiff, a police constable, obtained from a justice an order upon the defendant under 27 Geo. 2, c. 3, s. 1, and 11 & 12 Vict. c. 42, s. 26, for the expenses of conveying two prisoners, one summarily convicted, and the other committed for trial, from the police office to the prison. The defendant refused payment, on the ground that these expenses must be defrayed by the Treasury under the Prison Act, 1877.*

*Held, upon a special case stated in an action to recover these expenses, that the defendant's contention was correct, and that therefore the plaintiff was not entitled to recover.*

*Judgment of the Queen's Bench Division reversed.*

**T**HIS was an appeal from a decision of the Queen's Bench Division, upon a special case stated under Order XXXIV., r. 1.

(a) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

The facts of the case and decision of the court below are fully set out in the report of the case in the Q. B. Div. See *ante*, p. 413.

The provisions of sects. 4 and 57 of the Prison Act, 1877, on which the case was decided, are set out in the head-note.

*The Solicitor-General* (Sir F. Herschell) (*E. Olarke*, Q.C. and *E. Baggallay* with him) for the defendant.—The liability sought to be imposed on the defendant is transferred to the Secretary of State by the Prison Act, 1877 (40 & 41 Vict. c. 21), s. 4. The words “any person committed to prison” in sect. 57 are not confined to persons who have actually been received into the prison, as Lush, J. decided, but include all persons who have been either committed to prison or committed for trial, from the moment of the committal by the magistrate in each case. That moment is “the period of his committal to prison” within the meaning of sect. 57. The words “as would if this Act had not passed have been payable by a prison authority” in that section are meant to include such expenses as would have been payable out of the fund administered by the prison authorities, that is, the rates, and these expenses would have been so payable, because, although the treasurer was the person who was to pay in the first instance, the expenses would have been allowed in his accounts. Unless this is the correct view, the proviso at the end of sect. 57 is meaningless. *Reg. v. Mews* (43 L. T. Rep. N. S. 403 ; L. Rep. 6 Q. B. Div. 47) is no authority against the defendant in the present case.

Sir *H. S. Giffard*, Q.C. (*Poland* with him) for the plaintiff.—These are not such expenses as would have been payable by a prison authority within the meaning of sect. 57. The payments made by the treasurer under 27 Geo. 2, c. 3, and 11 & 12 Vict. c. 42, cannot be said to have been allowed by the justices in quarter sessions, so as to bring them within the words above referred to, even assuming that the justices were the prison authority. But the words “prison authority” occur for the first time in the Prison Act, 1865 (28 & 29 Vict. c. 126), and therefore, when the previous Acts were passed, there was no “prison authority.” A person is not “committed to prison” within the meaning of sect. 57 until he is actually in prison ; and therefore the persons in respect of whom these expenses were incurred were not “prisoners” within the Act, and sect. 4 does not apply. The proviso at the end of sect. 57 may have been inserted from excess of caution.

*E. Baggallay* replied.

Lord SELBORNE, L.C.—The Divisional Court from which this appeal is brought evidently felt considerable difficulty in dealing with the question. Lush, J., for whose opinion I need not say we have on all occasions the highest respect, expressly said so. But, independently of that, it is quite obvious that the learned Judges must have felt very serious difficulty from the frank admissions which they made in their judgment that the conclusion they came to is unsatisfactory, because, as Lush, J. says, the result of his

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conclusion is, that the proviso at the end of sect. 57 of the Act of 1877 must be rejected altogether; and that is also repeated by Manisty, J.: "I think we must reject the proviso; this is no doubt a strong thing to do, but it constitutes the only difficulty which I feel in the case." With great deference to both the learned Judges, I am by no means satisfied that, if there had been no proviso, I should have come to a different conclusion from that at which I actually arrive, which is in favour of the appeal. But, at all events, this is clear, that, if we can avoid rejecting the proviso by a construction which the words can properly bear, we ought to do so, so as to give effect to the proviso as well as every other part of the enactment. Now, I observe—and that increases one's impression of the difficulty which they felt—that the two learned judges did not proceed upon the same grounds. Lush, J. bases his construction of the Act of 1877 upon the meaning which he thinks ought to be attributed to the words "person committed to prison," or, rather, to the word "committed" in that context in sect. 57. That appears to be the whole foundation of his judgment. On the other hand, Manisty, J. founds his judgment principally on the words "as would as if this Act had not passed have been payable by a prison authority," and in the construction of those words apparently relies very much upon the inapplicability of the construction which he did not adopt to the county of Middlesex. Now, to deal with those different grounds of judgment separately, I will first endeavour to follow Lush, J. in answering the question, what is the meaning of the word "committed" in the definition of a prisoner as a "person committed to prison" in sect. 57? The learned judge says: "I think it is clear, looking to the words of sect. 4, which throws the maintenance of prisons and of the 'prisoners therein' on the Secretary of State, that 'committed' must mean actually in the prison." I confess I cannot adopt that conclusion. But for the word "therein" in sect. 4, I should have thought it quite clear, both from the natural and popular use of the words "committed to prison," which ought not to be departed from without reason, and also from the manner in which they have been used by the Legislature in other Acts *in pari materia*, that they refer to the authority given by the magistrates for the person being in prison. It appears to me to be clear that this is the sense in which corresponding language is used in Jervis's Act, 1848 (11 & 12 Vict. c. 42), in sects. 25 and 26 of which power is given to justices, by a warrant in a certain form, to commit any person accused to the common gaol or house of correction for the purpose of being there safely kept until he shall be delivered by due course of law. The verb "commit" there expresses the act of the justices, and must not therefore, as I apprehend, be read as being actually received into prison. Then the forms which are referred to in those clauses distinctly show that the same thing is meant, because the act of the justices addressed to the constable and keeper of the prison in form T. 1 is called the warrant of commitment, and in form this is an order

to take the person accused and him safely convey to the prison and there deliver him, and to the keeper to receive him. Then there is the gaoler's receipt for the prisoner, and the justice's order thereon for payment of the constable's expenses in executing the commitment. The commitment is a thing, therefore, executed by the constable, whose duty, of course, ceases when the man gets into the prison, and, amongst the expenses that are allowed, one is for the subsistence of the prisoner while in custody; that means in the constable's custody after commitment. Therefore nothing can be more clear than that the word "commitment" in that statute, which is the general statute antecedent to that of 1877, means the act of the justices in ordering the commitment. On what ground are we to depart from that sense, and adopt the time of actual imprisonment under an order of commitment in this particular case? As far as I can see, the learned judge proceeded only on this ground, that the word "therein" occurs in the 4th section "on and after the commencement of this Act all the expenses incurred in respect to the maintenance of prisons to which this Act applies, and of the prisoners therein, shall be defrayed out of moneys provided by Parliament." With great deference to the learned judge, it does not seem that the word "therein" has at all the meaning which he has ascribed to it. Its meaning is the maintenance of prisoners who are imprisoned in the prisons to which this Act applies. I grant, therefore, that, if you cannot show the man to have been a prisoner in any such prison, he is not a person whose maintenance is provided for; but, when you turn to the 57th section, and take it in connection with the 28th section, it seems perfectly clear that the maintenance of a prisoner includes expenses incurred, not only while he was in prison, but when he was on his way to prison, and includes as much those incurred under the original order of commitment, before he came into prison at all, as those which may be incurred afterwards in removing him from one prison to another. The 28th section, to which Mr. Baggallay referred us in reply, says, "a prisoner shall be deemed to be in legal custody whenever he is being taken to or from, or whenever he is confined in, any prison in which he may be lawfully confined." He is not in prison *de facto* until he gets into prison; but for the purposes of the Act, and of the custody which the Act speaks of, he is equally a prisoner, deemed to be in legal custody, on his way to prison; and sect. 57 expressly says that the maintenance of the prisoner, which must refer to those words as they are found in sect. 4, includes all necessary expenses—I omit the word "such" for the present; I will refer to it afterwards—"incurred in respect of a prisoner for (*inter alia*) custody, safe conduct and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison." It strikes me, taking the words of the former Act (11 & 12 Vict. c. 42) with sect. 28 of this Act, that the man who has become a prisoner by being received into prison is to have

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his maintenance provided for in the sense of covering all the expenses before and afterwards according to that definition. I therefore am unable to accede to the interpretation of the word "committed," which was the foundation of Lush, J.'s judgment. It seems to me not to be made necessary by the use of the word "therein" in sect. 4, and if not made necessary by that word, it is excluded by the rest of the Act, as well as by the natural sense of the words. Then we come to the ground on which Manisty, J. rested his judgment, and there I agree that, if these expenses cannot be brought within the words of sect. 57, "such necessary expenses as would if this Act had not passed have been payable by a prison authority," then undoubtedly the appellant must fail. But is there really sufficient ground for saying that these expenses do not fairly and reasonably come within those words? Now, these expenses are the expenses of conveying the prisoner under the warrant of commitment to the prison, which had been provided for by 27 Geo. 2, c. 3, and 11 & 12 Vict. c. 42, in this manner—I have not the very words of the Acts before me, but I think I state the substance correctly:—A justice of the peace, or one or more justices, might give a warrant on the county treasurer to pay those expenses to the constable in all counties except Middlesex, and the county treasurer receiving that warrant was bound to pay them, and he was to be allowed them in his accounts; with regard to his accounts under the Acts constituting that officer they are to be allowed and passed by the justices, or under the authority of the justices in quarter sessions assembled. The whole matter relates to that part of the duty of the justices which is concerned with prisoners, and with the conveyance of prisoners to prison. *De facto* and before the words "prison authority" became technical under any statute the justices were the prison authority within their own county, and by the Act 28 & 29 Vict. c. 126, they are expressly made the prison authority within the meaning of those words, as used in that statute, and evidently as repeated in this. As to all the other prison expenses within the prison, beyond a doubt the justices were the prison authority; those expenses were all paid out of the county rate, the same fund which pays these expenses. These expenses are *in pari materiâ*, and cannot, I think, be supposed to have been thrown on the county rates under an order of one or more justices made on the county treasurer in any other view than as expenses *ejusdem generis*, which ought to be borne elsewhere than in Middlesex in the same manner as prison expenses. Although it is true that the hand to pay them is the hand of the county treasurer, he is not without warrant, I agree, not from the justices in quarter sessions, but from one of the same body acting under a statutory authority in discharge of a duty which belongs to justices as such, but he is paid by the county treasurer out of the fund, which is under the control of the Court of Quarter Sessions and allowed necessarily by them; still it is allowed by them, and enters into his accounts, which they pass; and when in the 57th

section of this Act we have the words "payable by a prison authority," the reasonable interpretation of those words, I think, is to refer them not to the hand which is to pay, but to the person out of whose fund the payment is to be made. The whole question, which is fairly open to controversy and doubt, being whether the allowance of those expenses by the justices in quarter sessions is an act done by them as the prison authority, that question seems to me to be one of considerable refinement, and I do not say whether I should have been more embarrassed than I am now if I had not found anything in the Act to assist me. But there is the proviso, which proviso says that the effect of this shall not "exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison, or otherwise, which he would have been liable to pay if this Act had not passed." Then when I turn to the Act of 27 Geo. 2, c. 3, and the Act of 11 & 12 Vict. c. 42, which deals with the very expenses now in question, I find that in those Acts the primary liability is thrown on the prisoner if he has means; and it is only in default of those means that the liability is thrown on the county treasurer. The learned judges below fairly state that the effect of their conclusion is to render this proviso nugatory; but I think I see in that proviso sufficient light to satisfy me that it was expressly intended under the general words of the section to cover these expenses which those words most clearly, as I think, would include, unless it is to be held that they are not included because the justices may be said not necessarily to be acting as a prison authority when they pass the treasurer's accounts, and because the treasurer is not himself a prison authority but the justices are. The proviso seems to me to remove any difficulty which might have been felt on that ground. With regard to the circumstance that the county of Middlesex is dealt with, I know not for what reason, in an exceptional manner by the Act of 27 Geo. 2, c. 3, and 11 & 12 Vict. c. 42, and that the parish has to pay this class of expenses under those Acts, and not the county rate, all I can say is that, that being so, the county of Middlesex will not get the benefit of this Act of 1877. Why it should not I do not know, but it is clear that in the county of Middlesex these expenses are not paid in any sense whatever by a prison authority; but that the Act does not apply to the county of Middlesex can be no reason why it should not apply wherever those expenses are payable by the justices in quarter sessions assembled; and the proviso is perfectly sensible if it applies to all counties in England except the county of Middlesex. I think therefore that this appeal ought to be allowed.

BAGGALLAY, L.J.—I am of the same opinion. Sect. 4 of the Prisons Act, 1877, provides for the payment out of moneys to be provided by Parliament, of certain expenses incurred in respect of prisoners committed to prison. The words used in sect. 4 are very general, the expression there being "expenses incurred in respect of the maintenance of prisons to which this Act applies;"

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but when we come to sect. 57 of the same Act of Parliament, we find what the word "maintenance" is to include. Sect. 57 provides that the word "maintenance" shall include "all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of confinement to another or otherwise," within certain limits of time; but the expenses which are to be so provided for out of money to be provided by Parliament are subject to two qualifications. The first qualification is that they must have been incurred during the period commencing with the committal of the prisoner to prison, and ending with his death or discharge from prison. The second qualification being that they must be such expenses as would, if the Act had not passed, have been payable by a prison authority. It is not, in my opinion, very material to consider whether the expense of conveying a prisoner to prison, there to await his being put on trial for felony, comes accurately within an expense incurred in respect of his custody, safe conduct, or removal from one place of confinement to another. It would appear to come clearly within those words, and also within the more general words "or otherwise," which can apply to other expenses *ejusdem generis*. I think therefore there can be no doubt whatever that the expense of conveying these two prisoners, the one to Westminster and the other to Clerkenwell, were expenses in respect of the prisoner so committed to prison, provided the two qualifications to which I have already referred are satisfied. Then the first is, as I said before, that it must have been incurred purely between the period of his committal to prison and his death or discharge from prison. The learned judges in the court below, or one of them at least, seem to have been of opinion that the committal to prison was limited to the time when he was actually in prison. I am unable to take that view of the meaning of the words. Apart from any particular matter to be found in any Act of Parliament on the subject, I should be disposed to think that the order of committal by the magistrate under which the constable acted in conveying the prisoner to a prison was the commitment to prison; but that view appears to be entirely borne out by the 25th and 26th sections of Sir John Jervis's Act (11 & 12 Vict. c. 42), and the schedules to that Act, for we there have in the 25th section, as has been already pointed out by the Lord Chancellor, the warrant referred to as that which commits, or the act of the magistrate described when he uses his warrant as committing a prisoner to prison. That view is carried forward in the 26th section, and when we turn to the form of the warrant of committal, and of the receipt given by the gaoler on the reception of the prisoner, and to the certificate, or rather the order to the treasurer, for the payment of the expenses incurred by the constable, we find that view of the case is entirely borne out. The warrant is called the warrant of commitment, and then the receipt and payment of the constable's expenses are referred to. I am reading the



schedule of the Act. "Gaoler's receipt to the constable for the prisoner, and justice's order thereon for payment of the constable's expenses in executing the commitment:" (Form T. 2.) Executing the commitment was simply the conveyance of the prisoner from the place at which he was committed to the prison to which he was committed. Then as regards the other qualification, they must be such expenses as would, if the Act had not passed, have been payable by the prison authority. It is not necessary to refer to what has been already said by the Lord Chancellor. These were expenses which were substantially payable by the justices in quarter sessions, who by another Act of Parliament are made in terms that which they previously were, the prison authority, and they have been always paid by them. No doubt the order is made by an individual magistrate, or two or more justices, upon the treasurer to pay it, and the Act of Parliament requires that when that money has been paid by the treasurer it shall be allowed by the quarter sessions out of the county rate, the same rate which did bear all the other prison expenses. For these reasons I am of opinion that the appeal should be allowed.

BRETT, L.J.—If I could put my opinion forward in a different form to that in which the Lord Chancellor has expressed his judgment, I should think it only respectful to the learned Judges below to do so, but I cannot. I agree with every step of the reasoning that has been expressed by the Lord Chancellor, and with the form in which every step has been expressed.

*Judgment reversed.*

Solicitors for plaintiff, *Hare and Fell*, for the Treasury solicitor.

Solicitor for defendant, *F. F. Smallpeice*.

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## COURT OF CRIMINAL APPEAL.

*Saturday, March 5, 1881.*

(Before Lord COLERIDGE, C.J., and LINDLEY, LOPES, HAWKINS,  
and BOWEN, JJ.)

REG. v. WILLSHIRE. (a)

*Bigamy—Proof of former marriage—Long absence of wife—  
Presumption of continuance of her life—Presumption of  
prisoner's innocence—Conflicting presumptions—Effect of, for  
jury.*

*In 1864 prisoner married E. In 1868 prisoner was indicted and*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



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*convicted for marrying A., E., his wife, being then alive. In 1879 prisoner married B., and in 1880 he married O.*

*Prisoner was indicted for marrying O. in 1880, his wife B. alleged to be then alive, and upon the trial the prisoner proved by a witness and the production of the record, that in 1868 his first wife E. was then alive. The judge at the trial ruled that this was no evidence that E. was alive in 1879 when the prisoner married B., and that the prisoner was bound to show that E. was alive in 1879 to entitle him to an acquittal.*

*Held, that the question was one for the jury whether E. was alive or dead in 1879, at the time of the last marriage; and that the conflicting presumptions of the continuance of the life of E. after 1868, there being no evidence to the contrary, and of the prisoner being innocent and free to contract the marriage in 1879, were evidence for the jury to consider in determining the question.*

CASE reserved for the opinion of this Court by the Common Sergeant of the City of London.

The prisoner was tried before me at the Session of the Central Criminal Court held on the 31st day of January last.

The indictment charged that he married Charlotte Georgina Lavers on the 7th day of September, 1879, and that he feloniously married Edith Maria Miller on the 23rd day of September, 1880, his wife Charlotte Georgina being then alive. The indictment also charged that the prisoner had been previously convicted of felony at the Central Criminal Court in the month of June 1868.

A marriage between the prisoner and Charlotte Georgina Lavers on the 7th day of September, 1879, and a subsequent marriage between the prisoner and Edith Maria Miller on the 23rd day of September, 1880, were clearly proved. It was also proved that at the time of the prisoner's marriage to Edith Maria Miller his alleged wife Charlotte Georgina was alive.

When the case for the prosecution was concluded the prisoner's counsel asked the counsel for the prosecution to call a witness whose name appeared on the indictment, but the counsel for the prosecution declined to call him. The prisoner's counsel then himself called the witness, who produced a certificate of the previous conviction of the prisoner for felony in June 1868. The indictment for this felony and caption were also produced in Court by the proper officer at the instance of the prisoner's counsel.

The indictment was for bigamy, and alleged that the prisoner married Ellen Earle on the 31st day of March, 1864, and feloniously married Ada Mary Susan Leslie on the 22nd day of April, 1868, his wife Ellen Earle being then alive.

The prisoner's counsel contended that he had proved that the prisoner had a wife living in June, 1868, and that in order to convict the prisoner on the present indictment it was incumbent on the prosecution to show that his wife was dead on the 7th

day of September, 1879, when the prisoner married Charlotte Georgina Lavers.

Counsel for the prosecution contended that, there being no presumption of law that Ellen Earle was alive on the 7th day of September, 1879, when the prisoner married Charlotte Georgina Lavers (the presumption, if any, after seven years being, indeed, the other way), and the *prima facie* case of bigamy having been clearly proved by the prosecution on the present indictment, the onus was thrown upon the prisoner of showing that Ellen Earle was alive on the 7th day of September, 1879, when the prisoner married Charlotte Georgina Lavers.

I held that the burthen of proof was on the prisoner.

No evidence was offered by the prisoner's counsel that Ellen Earle was alive on the 7th day of September, 1879.

There was no evidence that the alleged marriage of the prisoner with Ellen Earle was declared void or dissolved by any court of competent jurisdiction. The prisoner was found guilty.

He was then arraigned on that part of the indictment which charged the previous conviction of felony in June, 1868, and pleaded guilty. I respited judgment. The prisoner remains in gaol. The question which I reserve for the opinion of the Court for the Consideration of Crown Cases Reserved is whether the prisoner has been properly convicted of feloniously marrying Edith Maria Miller, his wife Charlotte Georgina being then alive.

WILLIAM THOMAS CHARLEY.

*Ribton* for the prisoner.—Upon the present charge as laid in the indictment, it was necessary for the prosecution to prove that the prisoner's marriage with C. G. Lavers was a valid marriage, and that she was alive at the time when the prisoner married E. M. Miller in 1880. There was a previous conviction for bigamy in 1868 charged in the indictment, the prisoner having in 1868 married A. M. S. Leslie, his wife Ellen Earle being then alive, and evidence of this was given upon the present charge. [HAWKINS, J.—The evidence showed that the prisoner married Ellen Earle in 1864, that he afterwards contracted marriages in 1868, 1879, and 1880, and the evidence did not show that Ellen Earle was dead. LOPES, J.—It appears to me that the only legal marriage was that with Ellen Earle, who was shown to be alive in 1868, and that there was no evidence that she was dead.] The presumption of law is in favour of the continuance of a life. [LOPES, J.—In *Reg. v. Lumley* (11 Cox C. C. 274; L. Rep. 1 C. C. R. 196), it was held that there was no presumption either way, and that it was a question for the jury whether the wife was living or dead.] He (counsel) referred to 1 Taylor on Ev. 199, and the cases there cited. [HAWKINS, J.—Until a man is proved to be guilty the presumption is in favour of his innocence. If so, must not the prisoner be presumed to have been innocent of

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any crime when he contracted the marriage in 1880.] In this case the prosecution was bound to prove that C. G. Lavers was the lawful wife of the prisoner as alleged in the indictment, and if they failed to prove that, the prisoner was entitled to be acquitted. The 19 Car. 2, c. 6, s. 2, fixed the period of seven years for the duration of the presumption of life of persons beyond the seas or absenting themselves, upon whose lives estates depended, in the absence of evidence as to their being alive. [Lord COLERIDGE, C.J.—Need you contend further than this? The prisoner is proved to have married a woman in 1864, and there was evidence that she was alive in 1868, and in order to convict upon this indictment it was necessary to show that she was dead in 1879, and there was no proof of this.] Ellen Earle was proved to be alive in 1868, and in the absence of any evidence to the contrary the presumption is that she was alive in 1879. The *onus probandi* that she was then alive was not thrown upon the prisoner, as ruled by the learned Common Serjeant.

*Poland* (Montagu Williams with him) for the prosecution.—The conviction is right. There was a *primâ facie* case proved against the prisoner. The prisoner in 1879 married C. G. Lavers *in facie ecclesiæ*, and that must be presumed to have been a valid marriage until there was evidence given that it was not a valid marriage. The prisoner must be taken to have then represented himself as free to marry. The presumption therefore arises that, when he married in 1879, he did not commit a crime. It was for the prisoner to displace this *primâ facie* case by evidence, and it is submitted that he did not do so by showing that, eleven and a half years before, viz., in 1868, he had a wife living. [Lord COLERIDGE, C.J.—The learned Common Serjeant ruled that the prisoner was bound to show that Ellen Earle was alive in 1879. He did not leave it to the jury to say whether, upon the conflicting presumptions, she was then alive or dead.] The 24 & 25 Vict. c. 100, s. 57, sanctions the presumption that seven years' absence of a wife, not known to be living, prevents a second marriage from being a bigamous one, should it turn out that in point of fact the wife was living at the time of the second marriage. [Lord COLERIDGE, C.J. referred to *Doe v. Nepean*, 5 B. & Adol. 86.] The Common Serjeant left the facts to the jury, with the direction that, under the circumstances, the onus of proving that Ellen Earle was alive in 1879 was upon the prisoner. In this case Ellen Earle had not been heard of. [Lord COLERIDGE, C.J.—That the prosecution did not show.] The learned counsel then referred to *Rex v. Twynning* (2 B. & Ald. 386), the marginal note of which is, "The law always presumes against the commission of crime, and therefore where a woman, twelve months after her first husband was last heard of, married a second husband, and had children by him, it was held on appeal that the sessions did right in *primâ facie* presuming that the first husband was dead at the time of the second marriage, and that it was incumbent on

the party objecting to the second marriage to give some proof that the first husband was then alive."

LORD COLERIDGE, C.J.—I am of opinion that this conviction cannot be sustained. The facts are short, and it appears that there was an undoubtedly valid marriage contracted by the prisoner in 1864, and there was some evidence given at the trial that that wife was alive in 1868. I carefully abstain from saying that she was proved to be alive in 1868, but there was some evidence of the presumption that she was alive in 1868. Then, in 1879, the prisoner contracted a marriage *in facie ecclesie*, and it is said that it is to be presumed that that was a valid marriage. Now the prisoner is indicted in respect of his marriage in 1880, and the marriage in 1879 is relied upon to show that the marriage in 1880 was illegal. Upon the trial of the indictment the prisoner proved a valid marriage in 1864, and gave some evidence of the presumption that the woman he then married was alive in 1868, thus setting up a life in 1868 which, in the absence of any evidence to the contrary, must be presumed to be continuing in 1879, no evidence of any kind being given, but it being shown simply that the woman was alive in 1868. It is said that the fact of the marriage in 1879 shows either that the prisoner must have stated that he was an unmarried man and free to marry then, or that the presumption that the prisoner was then innocent of any crime was sufficient to rebut the presumption of the continuance of the life of the woman he married in 1864. I agree that this conflict of presumptions was sufficient to raise a question of fact for the jury to determine whether that woman was alive in 1879, or whether the prisoner told a falsehood when he was married in 1879, but the learned Common Serjeant did not leave that question to the jury. He ruled that, besides showing the existence of the wife's life in 1868, the prisoner was bound to prove that it continued till 1879. There is no such rule of law. The prisoner was not bound to do more than set up the life in 1868, which would be presumed to continue, and it was then for the prosecution to show by evidence that that presumption was rebutted. It was for the prosecution to determine the life; not for the prisoner to show its prolongation. I am therefore of opinion that this ruling was wrong, and that the conviction cannot be sustained.

LINDLEY, J.—I am of the same opinion. There appears to have been some evidence both ways upon the point whether Earle was alive or dead in 1879. The case turned entirely upon this question, but it was not left to the jury. The conviction cannot therefore be sustained.

HAWKINS, J.—I am of the same opinion. The validity of the marriage in 1879 depends upon the question whether Ellen Earle was or was not alive in 1879. If she was alive the prisoner was entitled to be acquitted; if she was dead the conviction is good. On the part of the prisoner it was proved that she was alive in 1868, and the presumption would be that she is still

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living. The only evidence to the contrary is the fact that the prisoner presented himself in 1879 to be married to C. G. Lavers, and it is said that he must be presumed to have represented that he was then able to be married to her according to law. That raised a question of fact for the jury, but it was not left to them, and the learned Common Serjeant directed that the prisoner was bound to do more, and show that Ellen Earle was alive in 1879. In this he was wrong, and therefore the conviction must be quashed.

LOPES, J.—I am of the same opinion. The essential question upon which this case depends is whether Ellen Earle was alive or dead in 1879. I think there was evidence both ways, which ought to have been left to the jury, but it was not.

BOWEN, J.—I am of the same opinion.

*Conviction quashed.*

## HOUSE OF LORDS.

*March 10 and 11, 1881.*

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN and WATSON.)

CASTRO, *alias* ORTON, v. THE QUEEN. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

*Perjury — Separate counts charging separate misdemeanours — Consecutive sentences — Sufficiency of indictment — Stat. 2 Geo. 2, c. 25, s. 2 — 14 & 15 Vict. c. 100, s. 24.*

*The appellant was indicted for perjury; the indictment contained two counts, the first alleging perjury committed on the trial of an action of ejectment in 1871, the second alleging perjury committed in proceedings in Chancery in 1868. The assignments of perjury in the two counts were not identical, but the object of the proceedings in 1868 and in 1871 was the same, namely, to establish the appellant's right to certain landed estates. The jury found a general verdict of guilty upon both counts of the indictment, and the appellant was thereupon sentenced to seven years penal servitude upon each count, the second term to commence upon the expiration of the first term.*

*Held (affirming the judgment of the court below), that such a sentence might be lawfully passed, although the statute 2 Geo. 2, c. 25, s. 2 (as amended by subsequent Acts), makes seven years' penal servitude the maximum punishment for a single perjury.*

*Held further, that the statute of Geo. 2, which empowers the Judge to order a person convicted of perjury "to be sent to a House of*

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.



*Correction for seven years, "there to be kept to hard labour," and thereupon judgment shall be given that the person convicted shall be committed accordingly over and beside such punishment as shall be adjudged to be inflicted upon such person agreeable to the laws now in being," does not require the infliction of a common law punishment in addition to that prescribed by the statute.*

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*And also, that since the passing the statute of the 14 & 15 Vict. c. 100, s. 24, an indictment for a statutory offence which is also a common law offence need not conclude with the words "against the form of the statute," &c., in order to enable the court to impose the statutory penalty.*

*O'Connell v. The Queen (11 Cl. & F. 155) and R. v. Wilkes (4 Burr. 2527) discussed.*

THIS was an appeal from a judgment of the Court of Appeal (James, Bramwell, and Brett, L.JJ.) reported *ante*, p. 436; 5 Q. B. Div. 490, and 43 L. T. Rep. N. S. 78), on a writ of error from a judgment of the Court of Queen's Bench on an indictment for perjury.

The facts appear sufficiently from the report in the court below, where the sections of the Acts of Parliament are set out at p. 442, note (b), the 2nd section of 2 Geo. 2, c. 25, being by mistake printed sect. 10.

*Benjamin, Q.C., Atherley Jones, Hedderwick, and Russell Spratt* appeared for the appellant, and contended that the whole of the perjuries set out in the two counts amounted to one and the same proceeding in fact, the object being the same, to recover the estates, and therefore that only one sentence could be passed in respect of them; and that the verdict, being general on both counts, only covers what is common to both. The authorities require a special verdict on each count to justify a separate sentence in each. See the observations of Lord Denman and Lord Campbell in *O'Connell v. The Queen* (11 Cl. & F. 155), citing *R. v. Rhodes* (2 Ld. Raym. 886), and *R. v. Powell* (2 B. & Ad. 75). See also the opinion of Tindal, C.J. in *O'Connell's case*; and the case of *Ryalls v. The Queen* (11 Q. B. 781) shows that "perjury" is to be considered *nomen collectivum* like "misdemeanour" in *R. v. Powell*. See also *R. v. Ellis* (6 B. & C. 145). Secondly, on an indictment for a common law offence only the common law punishment can be inflicted, unless the indictment concludes "against the form of the statute," &c., which is necessary for the statutory punishment. This does not affect the sufficiency of the indictment for a conviction, which is all that statute 14 & 15 Vict. c. 100, s. 24, was directed to, but only the punishment. See 2 Hale's Pleas of the Crown, 191; 2 Hawkins' Pleas of the Crown, c. 25, s. 116; 2 Chitty's Criminal Law, c. 9, p. 316. Thirdly, the statute 2 Geo. 2, c. 25, s. 2, shows that a common law punishment ought to have preceded the sentence of penal servitude; the words are words



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of compulsion; and further, that section imposes seven years' penal servitude as the maximum punishment for perjury, and therefore the sentence in the present case, which practically amounts to fourteen years, was bad. See *R. v. Price* (6 East, 323); *R. v. Wilkes* (19 Howell's State Trials, 1075, and 4 Burr. 2527). *R. v. Robinson* (1 Moo. C. C. 413) may be cited against this contention, but that was only a dictum, and under a different statute. See also *R. v. Outbush* (L. Rep. 2 Q. B. 379; 10 Cox C. C. 489), and the American decision in *Tweed v. Lipscomb* (15 Sickels, N. Y. Rep. 559), where the point was distinctly decided. The following authorities were also referred to in the argument: *R. v. Trueman*, 8 C. & P. 727; *Orepps v. Durden* (Cowp. 640); *R. v. Benfield* (2 Burr. 980); *R. v. Aylett* (1 T. R. 69); *R. v. Galloway* (1 Moo. C. C. 234); *R. v. Roberts* (Carthew, 226); *R. v. Kingston* (8 East, 41; Com. Dig. tit. "Indictment," p. 510); *R. v. Jones* (2 Camp. 131).

The *Attorney-General* (Sir H. James, Q.C.), the *Solicitor-General* (Sir F. Herschell, Q.C.), *Poland*, and *A. L. Smith*, who appeared for the respondent, were not called upon to address the House.

At the conclusion of the arguments for the appellant, their Lordships gave judgment as follows:

The LORD CHANCELLOR (Lord Selborne).—My Lords: Notwithstanding that the case has been argued at the bar of the House with so much ability and zeal in support of the appeal, I believe your Lordships are agreed that it is unnecessary to call upon the learned counsel for the Crown to answer the objections which have been raised to the judgment pronounced by the Court of Queen's Bench. No fewer than six objections have been taken to that judgment, and I will deal with them shortly, reserving to the last that which alone appeared to me to be seriously relied upon by the leading counsel for the appellant. The first objection to the judgment was that there was no finding of guilty upon each count, but that there was a general finding of guilty upon the charges which were contained in both counts. This objection was founded upon the language of the verdict, which was as follows: "And now at this day—that is to say, on the said Saturday, the 28th day of February, in the year of our Lord 1874, the jurors aforesaid so empanelled and sworn as aforesaid, to try the issues so joined as aforesaid, upon their oath say that the said Thomas Castro, otherwise called Arthur Orton, otherwise called Sir Roger Charles Doughty Tichborne, Bart., is guilty of the premises on him above charged in and by both counts of the indictment aforesaid above specified in the manner and form as aforesaid, as by the indictment aforesaid is above supposed against him." I need not say more with regard to this objection than that it appears to be founded upon a perverse and an unreasonable construction of the language of the verdict, which clearly refers to each count. The second objection was that the indictment did not conclude with the words *contra formam statuti*.

In reference to this objection, I may say that, before the passing of the 14 & 15 Vict. c. 100, it undoubtedly was the law—for, although it was a mere technicality, it was still settled law—that an indictment founded on a statute should contain those words, in order to justify the infliction of a statutory punishment for an offence which was also a common law offence. It was, however, for the very purpose of obviating the inconvenience and the unreasonable consequences of that and other similar technical rules relating to the form of pleading in criminal cases that the statute of the 14 & 15 Vict. c. 100, was passed, which said that no indictment should be held insufficient by reason of the omission of those forms. It was argued that the language of the statute merely meant that the indictment from which those words were omitted should not be held bad, but that it was not sufficient to warrant the assumption that the statutory penalty could be inflicted under an indictment from which those words were omitted. I am of opinion that to place such a narrow construction upon the words in a remedial statute intended to get rid of inconvenient technicalities would be a very great mistake on your Lordships' part. When the statute said that the indictment from which those words were omitted should not be held insufficient, I am of opinion that it was not intended that the indictment from which those words were omitted was to be held insufficient for any purpose for which it would have been sufficient if it had contained those words. That, therefore, disposes of the second point. The third objection to the judgment was founded upon the words of the statute of 2 Geo. 2, c. 25, and it was contended that the sentence was bad because the punishment inflicted was not an addition to some other and further punishment which might have been inflicted if that statute had not been passed. This objection applies equally to both terms of penal servitude, but, in my opinion, there is no foundation whatever for it. It is based on these words, in sect. 2 of the statute: "And the more effectually to deter persons from committing wilful and corrupt perjury or subornation of perjury, be it further enacted by the authority aforesaid, that, besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the Court or Judge before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some House of Correction within the same county for a term not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be transported"—I do not think we need pursue the alternative of transportation—"and thereupon judgment shall be given that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person agreeable to the laws now in being." Even if the punishment which the laws in force for the time being permitted to be inflicted for perjury before

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that statute was passed had been *diversi generis* from that which would be suffered under this clause in all respects, I still greatly doubt whether it would be a reasonable construction of the clause to hold that it requires cumulative punishments under the common law, or the statute of Elizabeth, and also under this Act of George II. in all cases. I think it probable that this would be the reasonable construction—that it meant to leave the Judge such discretion as he had before at common law with regard to common law punishment, which he might or might not think it right to inflict in addition to the power to punish within the limits authorised by this statute. But I do not think, according to the view which I take of the matter, that even that question need be determined, because the substance of the provision is this: whereas before, this offence was punishable by imprisonment simply, the additional power is given to commit to the house of correction for a time not exceeding seven years, there to be kept to hard labour, which certainly must necessarily include the addition of the period of hard labour in the house of correction over and above the imprisonment. That there should be a distinct and separate term of imprisonment, besides the imprisonment in the house of correction to which hard labour is superadded, does not seem to me to be at all within the reasonable interpretation of the statute. That is no doubt an objection which a prisoner convicted and sentenced is perfectly at liberty to urge, if he can make it good at law. It means not that he has received too severe punishment, but that he ought to have received more punishment still, and the interpretation which I propose to your Lordships to put upon the words of the statute is not adverse to persons sentenced for criminal offences of this kind, but one of rather greater leniency, and more in their favour. The next objection is that, the perjury in question having been committed in one and the same proceeding, it could not be made the subject of two separate punishments. No authority, however, was cited to show that perjury committed in the Court of Chancery in 1868 and perjury committed before the Chief Justice of the Common Pleas in 1871 must be regarded as constituting one and the same offence, even although they had one common object—that of substantiating a claim to certain estates. I should have been of opinion that the offences were separate, even although the assignments of perjury in each count had been precisely the same, but in point of fact there are some which are different. There were two distinct offences committed at two distinct times in two distinct suits, and it is clear that the appellant was indictable in respect of each of them. It has further been very zealously argued at your Lordships' bar that, however many counts there might be, only one judgment could be properly passed upon one indictment for misdemeanour. No authority whatever has been cited in support of that contention, but the case of *O'Connell v. The Queen* (*ubi sup.*), which has been so often referred to for other purposes, is a full authority against it.

I do not think it necessary to refer to any other authority than to read two or three passages which are to be found in the opinions delivered in that case. In the first place Parke, B. (p. 295) says this: "If this point were to be considered independently of the understood rule upon the subject, and supposing that no such rule existed, I should say that, where an indictment contains several counts, each ought to be brought to its proper legal termination by a proper judgment. The practice has grown up, and much increased in modern times, of introducing many counts into one indictment; and though we know practically that these are most frequently descriptions only in different words of the same offence, they are allowable only on the presumption that they are different offences, and every count so imports on the face of the record, as Buller, J. states in *R. v. Young* (3 T. R. 106), though Taunton, J. intimated a different opinion, I think without sufficient ground, in *R. v. Powell* (2 B. & Ad. 78). The question then being how these counts are to be dealt with on the face of the record, I should have said, *à priori*, that it was the duty of the Court acting between the Crown and the accused, and the right of the accused to have the charge of each offence, for as such I must treat it, properly and finally disposed of on the record, so that the accused, as well as the Crown, might know for what offence the punishment was inflicted, and for what not." I will now refer to what was said in this House by two noble and learned Lords who took part in the judgment which the House pronounced, namely, Lord Denman, then Lord Chief Justice, and Lord Campbell, afterwards Lord Chief Justice. Lord Denman said: "So, with regard to several counts in criminal cases, the objection may be entirely avoided by the Court passing a separate judgment upon each count, and saying, 'We adjudge that upon this count on which the prisoner is found guilty he ought to suffer so much; that on the second count he ought, on being found guilty, to receive such a punishment. Whether the count turns out to be good or not we shall now pronounce no opinion.' " Lord Campbell adds (p. 415): "It is an utter mistake to suppose that there is only one *corpus delicti* which is made the subject of several counts in one indictment. Even with respect to felony, the law supposes a separate offence to be charged in each count; and in misdemeanours there are not unfrequently in the different counts entirely different offences, of different sorts, committed at different times." And I may add that the judgment of the House in that case was that, if there were not a separate judgment on each count, then, if there were one count bad at law, the judgment, being incapable of being referred to the good counts, must be regarded as distributed among them all, and the whole proceeding would fail. I must say that I heard this point argued by the junior counsel for the appellant with some surprise, because I understood that it had been given up by his learned leader. This brings me to the remaining objection, and the only one of substance in the case, which is, that a separate and

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cumulative sentence of seven years' penal servitude was imposed upon the appellant in respect of each count of the indictment, whereas by 2 Geo. 2, c. 25, s. 2, and the Acts of Parliament amending the same, the maximum term of penal servitude that could be inflicted in respect of the offence charged in the indictment was seven years only, and no greater penalty could be imposed for any offence or offences charged in one and the same indictment greater than the maximum penalty imposed by the law for such offence or offences. If it were not possible consistent with the law to inflict cumulative punishments, one to take effect after the expiration of the other, this argument might have had some weight. It had, however, been settled in that House as long ago as 1769, in the case of *R. v. Wilkes (ubi sup.)*, that the proper course when more than one sentence had to be pronounced was that the second term of punishment should commence at the expiration of the first. To the reasons given for that by Wilmot, C.J., and apparently adopted by this House, I will shortly refer. I will first, however, state the question which was raised and put to the Judges, which was this: "Whether a judgment of imprisonment against a defendant to commence from and after the determination of an imprisonment to which he was before sentenced for another offence is good in law?" to which the learned Judges returned an affirmative answer in the terms of the question; and thereupon this House affirmed the judgment which had been in fact so pronounced. That was a case of misdemeanours, and the material passages which I think it worth while to refer to in the opinion delivered by Wilmot, C.J., and reported in 19 Howell's State Trials 1133, are these: "In treasons and felonies there is a certain known judgment which cannot be departed from, viz., in the present tense of the subjunctive passive; but in misdemeanours, where the punishment is discretionary, the limitation as to time seems only to be that the punishment shall take place before a total dismissal of the party; a punishment shall not hang over a man's head when he has been once discharged; that is properly a punishment *in futuro*. But whilst he remains under a state of punishment, whilst he is suffering one part of his punishment, he is very properly the object of a different kind of punishment to take place during the continuance of the former, or immediately after the end of it." And a little further on he says that if the punishment had been inflicted by imprisonment for twelve months, then, as the prisoner was already sentenced to ten months, it would have been only an imprisonment for two; in other words, that the power which the Court thought fit, having discretion to exercise, of awarding a period of twelve months' imprisonment for the second offence, could not have been exercised unless it were by placing it after the expiration of the first. Now I will observe that in a case like the present, where the statutory power is to imprison for a term not exceeding seven years, if you were to pass two



simultaneous sentences commencing at the same time, it would be manifest that for the second offence there would be no punishment at all suffered, even though it were given for the maximum period. Then later Wilmot, C.J. says this: "We cannot explore any mode of sentencing a man to imprisonment who is imprisoned already, but by tacking one imprisonment to the other, as is done in the present case." So far, therefore, as relates to misdemeanours, and subject to the question whether this authority would apply when the aggregate of the two punishments exceeds in point of time that which there would have been power to award for either offence alone, subject to that, the case of *Reg. v. Wilkes (ubi sup.)* in this House is a clear and distinct authority in favour of the proposition that when a man is found guilty of two distinct misdemeanours, being distinct and separate offences, and not the same (I apprehend that it makes no kind of difference whether it be by two indictments simultaneously tried and found against him, or upon two counts in one and the same indictment), there, not only a competent, but the proper course independent of any statutory legislation, was and is to pronounce a second sentence of imprisonment, within the power of the court as to duration, to begin after the expiration of the first. If that be so, I ask what difference can it make that a statute has said that for a single offence, instead of having a discretionary power to imprison for any term that may be thought fit, the Court shall have power to imprison for a term not exceeding seven years? The only difference it makes is this, that for each offence the Court can go as far as seven years, and cannot go further; but the moment that it is ascertained that it is proper for the Court to make a second sentence for a distinct offence commencing after the expiration of the imprisonment to be suffered for the first, then the sentence so commencing, being for seven years only, is not within the sense of the statutory limit, and it is a mere fallacy, the moment that you understand the point of the case of *Rex v. Wilkes (ubi sup.)*, to mix up the two together as if they were one offence, and to say that because only one seven years can be inflicted for a single offence, therefore only seven years in the aggregate can be inflicted for two offences. The statute has not said so, and, having regard to what the House decided in the case of *Rex v. Wilkes (ubi sup.)*, it would be perfectly nugatory, and would be absolutely depriving the court of the power of postponing the commencement of sentence, to say that it ought to be so. If the argument were good for anything, it would be good not only to cut off the seven years, but to cut off any part of the seven years. If the first sentence was for the full period of seven years, the result would be that it would be impossible, according to that argument, to sentence a man for a second offence for a period to commence after the end of the first. It does not stop there, because since 1769 the Legislature has thought fit to extend this principle even to cases of felony. By the Act 7 & 8 Geo. 4, c. 28,

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it was so provided, there being added, *ex cautela*, as I conceive, to the end of sect. 10 of that Act which dealt with the matter, and expressly said that when a person was "already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence to commence at the expiration of the imprisonment to which such person shall have been previously sentenced," these words, "although the aggregate term of imprisonment may exceed the term for which the punishment could be otherwise awarded." I have left out the alternative of transportation for shortness only. I apprehend that if those last words had not been there the effect would have been practically the same; but those words at all events show that as far as those cases are concerned the intention of the Legislature when expressly dealing with them was the same as I conceive would have resulted in law from the rule which was settled in this House in the case of *Rex v. Wilkes* (*ubi sup.*), as to cases of misdemeanour. That was followed up by the case of *Rex v. Robinson* (1 Mood. C. C. 413), in which thirteen learned Judges were of opinion that there being two distinct misdemeanours charged in the same indictment in different counts, and one sentence for two years' imprisonment passed, that was bad, because by statute one year was the maximum term which the Court had the power to inflict for that offence; but all the thirteen Judges (all but Parke, B. and Patteson, J. being present) are stated to have been unanimously of opinion that the sentence was incorrect, and that there should have been consecutive judgments of one year's imprisonment each. The conviction was therefore held to be bad. Now that was a case of misdemeanour; it was not a case of felony; it is therefore, as far as the opinion of the thirteen Judges goes, expressly in point on this occasion. After that another Act of Parliament was passed, giving justices, in the exercise of summary jurisdiction in criminal cases, a similar power to that which had been given to the courts by the Act of the 7 & 8 Geo. 4. That Act was the 11 & 12 Vict. c. 43. It said (s. 25) that where justices upon information should adjudge a defendant to be imprisoned, and the defendant should "be then in prison undergoing imprisonment upon a conviction for any other offence, the warrant of commitment for the subsequent offence shall in every such case be forthwith delivered to the gaoler to whom the same shall be directed," and it should be lawful for the justices issuing it, if they thought fit, to award imprisonment for such subsequent offence which should commence at the expiration of the imprisonment to which such defendant should have been previously adjudged or sentenced. The Legislature did not add in that statute the words, "although the aggregate term of imprisonment should exceed the term for which the punishment might otherwise be awarded." A question under that statute came before the Court of Queen's Bench in the case *Reg. v. Outbush* (L. Rep. 2 Q. B. 379; 10 Cox C. C. 489), and the

only difficulty that was felt there by the learned judges, if any difficulty was seriously felt, was this—that the language of the one statute was: “Whenever sentence shall be passed for felony upon a person already imprisoned under sentence for another crime;” and the words of the latter statute were, “such defendant shall be then in prison undergoing imprisonment;” and the later statute, being thus expressed, seemed to justify the argument that if he had not actually got into prison, although a sentence of imprisonment had been pronounced upon him, the clauses did not apply. But that was held to be an untenable argument. Cockburn, C.J. stated, after communicating with the other judges, that it was ascertained that the practice of the Judges, as far as living judicial memory went, under the Act of 7 & 8 Geo. 4, had been to act upon that statute whenever more than one case of felony was established against a man, and he was convicted of them at one and the same time, to make the sentence of imprisonment for the second or third offence, as the case might be, commence at the expiration of the sentence previously awarded. The learned Chief Justice, although admitting that there was some technical difficulty, not in any other part of the matter, but in the particular words I have read, which seemed to contemplate that the man should be actually in prison, yet thought the reason and substance of the case to be so clear, in addition to the authority to be derived from the exposition based upon the earlier statute by the uniform practice, as to make it right to hold that cumulative sentences might be awarded under those statutes even though the man had not already found his way to prison; and in point of fact one sentence was passed practically at the same time as the other. The practice, therefore, as far as can be ascertained from any of the authorities, or from any of the books, has been uniform in favour of consecutive cumulative sentences of this kind; and if it were not so it would be difficult to see how it would be possible that any punishment at all could be inflicted for more than one offence, if the convictions took place at the same time. I believe I have now said everything that occurs to me as important to say to your Lordships with regard to this case, because, upon the decision in the State of New York in the case of *Tweed v. Lipscombe*, it is sufficient for me to say that it appears to me to proceed upon New York law and not upon English law; and the cardinal proposition upon which it all depends is one of those which, if the view I have submitted to your Lordships is correct, we must reject as erroneous, namely, that only a single judgment can be pronounced upon a single indictment. For all these reasons, and also bearing in mind that the Courts before whom this question has already come have unanimously agreed in their determination that there is no error in this record, I must move your Lordships to affirm the judgment, and to dismiss the appeal.

Lord BLACKBURN.—My Lords: I have never been able, from

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the beginning to the end, to entertain the least doubt that the judgment in this case should be affirmed. The first point which has been made on behalf of the plaintiff in error I think only requires to be stated to answer itself. It has been said that, when there was in the Court of Chancery a proceeding pending to set aside some outstanding term in order to permit a trial at law in an action of ejectment, and in the course of that the plaintiff, who is now the prisoner, being sworn, committed wilful and corrupt perjury, for the purpose of misleading the Court of Chancery in that suit, that was not a different offence, or rather, that the offence was substantially the same as the offence he committed afterwards, at the trial of the ejectment, in swearing falsely, and committing wilful perjury, with the intent to mislead the court that was trying the question of ejectment. It is said that they were substantially the same offence, because both perjuries were committed in suits in which the ultimate object was to recover certain estates situate in Hampshire and Dorsetshire. Taking that to be the point, and stating it in that way, it does seem to me, upon the face of it, to be difficult to state anything which would make it more obviously wrong than the mere statement of the case does. We have nothing whatever to do with the ultimate object of the perjury. The crime of perjury was complete as soon as the man wilfully and falsely swore a matter with the intention to mislead the Court of Chancery. The crime of perjury was complete when, at a subsequent time, the same man wilfully and intentionally made a false statement on oath with intent to mislead the Court of Common Pleas. No doubt his object in each case was to recover the same estates. In like manner, in the case which was put by way of illustration, the object of a man who breaks open a house in the country with the intention to steal a jewel-case, and, finding that the lady has carried it off to London, goes off to London, and breaks into a house in London, and gets the jewel-case, his object in each case is to get the jewels, but no one will dispute that the two house-breakings are two crimes. It would have been quite possible, if the Legislature had been so absurd, to have so worded the Act of Geo. 2, as to say that, when a man has, with one object, committed perjury, and commits afterwards any number of other perjuries for the same purpose, the aggregate punishment shall never, under any circumstances, exceed the seven years. Such a thing, if properly said by the Legislature, and sufficiently expressed, would of course be valid, but it is not pretended that there is a word in the statute of Geo. 2, which can by any torturing in argument afford a basis for that proposition. The next point, I think, namely, that the words *contra formam statuti* were not inserted here, rests upon one of those technical rules which have been most properly abolished by the Act 14 & 15 Vict. c. 100, and I think I need say no more upon that than that the Act clearly said in effect, that where any indictment would have required *contra formam statuti* before that Act was passed,

it shall hereafter be just as good and sufficient for all purposes as if it had contained those words. The next point is this: it is attempted to say that the statute of Geo. 2 requires that before you can pass a sentence of penal servitude you shall first pass a sentence such as would have been capable of being passed before that Act was passed. I can only say that I cannot construe the words as meaning that. The words of the statute seem to me to express very plainly that the Court may give this punishment, and then the Act proceeds to give the form of judgment, and says that the prisoner may be sentenced to transportation, for which penal servitude is substituted, and that may be done in addition to any punishment which shall be awarded at common law. That means, I think, any punishment which is given, if there be a punishment in addition. It does not mean that such a punishment shall necessarily be given in order to be a foundation for the other. If it did so the only effect would be that the sentence before the House should be amended by adding a fine of 1s. or an hour's imprisonment, or anything else the House might please. But I think it is quite unnecessary to do that, for I feel clear (agreeing there with the Court below) that the construction of the Act is not that which is contended for by the plaintiff in error. Then we come to what is more nearly approaching to something of substance, if it is really well-founded. I must say at once that I totally disagree with what has been repeatedly asserted by both the learned counsel at the bar, that the pleadings at common law in a criminal case and a civil case were in the slightest degree different. I am speaking, of course, of the time before the Judicature Acts were passed, which swept them all away. Many enactments had from time to time been passed relieving the strictness of pleadings in civil cases which did not relieve them in criminal cases, but the rules of pleading at common law were exactly the same in each case. The course taken with regard to an indictment which was found was this: the Queen having sent her commission to the grand jury, or any other commission, to a proper tribunal, that tribunal presented all the offences charged against the person, then if it was brought before the Court sufficiently that a man had committed ten murders, fifty burglaries, and a score of larcenies, they would find, not one finding as to them all, but they would find that he had committed each of those charged offences; and if there were many other persons, as generally there are, it would be also found that those other persons had committed the offences charged against them also, and of this presentment one record was made up. Upon that a process could be issued against a man so charged to bring him upon his trial before a petty jury to try whether he was guilty of those offences so charged, or not. Now at common law there was no objection whatever in point of law to bringing a man who was charged with several offences, whether those charges were felonies or misdemeanours, before one petty jury, and making him answer for the whole at one time. The contrary was asserted by the learned

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counsel, but although repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not fair to do it, because it embarrassed the man on the trial if he was accused of several things at once, and frequently the mere fact of accusing him of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him. For these mixed motives it was well established that whenever it would be unfair to a man to bring him to trial for several things at once an application might be made to the discretion of the presiding judge to say, "Try me only for one offence, or try me only for two offences; if one was the real thing let me be tried for one and one only;" and wherever it was right that that should be done the Judge would permit it; and it is further established by a long series of decisions (I confess I doubt whether they were right at first, but certainly they have been well established now, and sanctioned by statute, that is quite clear), that where the several charges were of the nature of felony, the joining of two felonies in one count was so necessarily, I may say, unfair to the prisoner, that the judge ought upon an application being made to him, to put the prosecution to his election, and send them to two trials. It never was decided, indeed the contrary was often maintained, that if that application for the election was not made, even in felony, the joining of several felonies, that is to say, the taking several felonies which had been found upon the finding of the indictment together, and trying those several felonies before one jury, was wrong in point of law; on the contrary, it was repeatedly held that it was right enough, although if the proper application had been made at the proper time in a case of felony, the party prosecuting would have been put to his election, or made to take one felony only, and not both at the same time. And in cases of misdemeanour it was by no means a matter of course that it should be done. I rather think that in point of practice, if the Judge upon an application had been satisfied that to try the prisoner for several misdemeanours together would have worked injustice to him, he had a perfect right to say, "I will not work this injustice by trying them together; let us diminish them in number, and try a reasonable number and no more." I do not know whether that was ever done in a case of misdemeanour, but I think it is very possible. I feel very little doubt that it may have been. I think that in such a case as the American case which was cited, where a man in one indictment was called upon to answer for two hundred offences, the man might not unreasonably have said, "That is too much to put a man upon his trial for; select five or six, try me on those, and let the rest stand over." I do not see that that would be at all an unreasonable application. And in the present case, if an application had been made to the Court of Queen's Bench to put the party to his election, and if it had been said, "I cannot be fairly tried



for one offence of perjury committed in Middlesex, if at the same time I am to be tried for perjury committed in London, therefore there must be two separate trials. If such an application had been made, the Court of Queen's Bench would doubtless have said, "We will listen to the arguments that may be urged in its favour." What they could possibly have been I do not know; but no such application was made. The prisoner was tried upon two indictments, the two counts were taken both together, and then the result was that he was found guilty upon both. An attempt was made to argue something upon the wording here, namely, that he was found guilty of the premises," to the effect that it did not mean the premises charged in each of the counts, but meant only, if I understand the argument rightly, such premises as were charged not only in the one, but also in the other. In the first place, that is not the meaning of the words; and secondly it would be utterly absurd, because the one count relates entirely to things which happened in London three years before, and the other to things which happened in Middlesex; therefore there could be nothing identical in the two. But he was found guilty, and then came the question, what was the sentence to be? It is clear that, if the Court had pleased to grant the application, these two counts might have been tried—the one in London before a London jury, and the other in Middlesex before a Middlesex jury; and, but for the Act relating to the Central Criminal Court, which gives that court jurisdiction over both, they must have been so tried. But, even now, they might have been so tried, and, if they had been so tried, and if each jury had found a verdict of guilty on the counts brought before it separately, *Rex v. Wilkes* (*ubi sup.*) would have been an authority absolutely in point as to the sentence, and there would not have been a pretext for saying there was the least difference. But then it is put in the argument in this way, that, when they are both tried before one jury, and when the party has not been put to his election, but the trial for both offences has taken place together, the consequence must be that he is not to be punished in the same way as he would have been if he had been tried for each before a separate jury, and he is therefore entitled to get off with less punishment. Why, I am sure I cannot conceive; nor can I see that any authority has been cited for that—at any rate, in English law; nor does it proceed on any reason. In regard to the American case, which was cited, it might be enough to say that I observe that it proceeds upon the express ground that the Court was acting upon New York decisions, subsequent to the Declaration of Independence, and upon New York statutes, and not upon English rules or English law. I daresay that decision may be right according to those New York decisions and statutes, but their decision is this: They say that, according to their view, of the New York decisions, where there is but one trial before one jury, it must be for one offence, and one only, and upon that they all rest. They logically enough say that, if that is granted

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where there are sentences passed for more than one offence, all but one must be *ultra vires*; accordingly, they held that the power of passing a sentence was exhausted by the first sentence. I leave it to the American Judges to say whether that was right or not according to American law. I do not pretend to express an opinion on that, but I am quite clear that it is not English law. I think that the English decisions are all the other way; and the reason of the case is, to my mind, quite clearly the other way. I will mention but one or two cases which prove it. The first is *Young v. The King* (3 T. R. 98), where the law is laid down in the way I have stated, that it is not a matter of right and law that two indictments shall not be tried together, but only a matter of election. Then comes *R. v. Jones* (2 Camp. 131), where Lord Ellenborough, C.J. both laid down the law as I have stated it, and acted upon it. Then *R. v. Kingston* (8 East, 41), where Lord Ellenborough, C.J. again repeats the doctrine; and lastly, *Reg. v. Robinson* (*ubi sup.*), which has been already cited, where it was said that the doctrine of *R. v. Wilkes* (*ubi sup.*) ought to have been applied to a case where there were two misdemeanours in separate counts tried together before one judge. Taking all these cases together, I myself can feel no doubt at all that by the English law, and going by that alone, there is not a pretence for this writ of error.

Lord Watson.—My Lords: After hearing the very ingenious arguments on the part of the appellant, I have come to the same conclusion as your Lordships, that there has been no reason whatever shown for reversing the judgment now under the review of the House; and the view which I take of the various objections which have been urged against the validity of the verdict and sentence has been so well expressed already that I do not feel justified in adding more than a few words to what has already fallen from your Lordships. The question as to what constitutes a separate offence where there has been a repetition of acts of the same character may at times involve questions of extreme nicety. It is unnecessary to deal with any of the cases such as have been suggested in the course of the argument, as to whether statements differing in their character, made by a person under oath upon the same occasion, will constitute separate acts of perjury when falsely made. It is quite unnecessary to consider that in the present case. I have no hesitation in holding with your Lordship upon the woolsack, who, I think, indicated that opinion, that where at two different times, at different places, in different suits, and under the sanction of two different oaths, the same man repeats the same false statement, he thereby commits two separate acts of perjury, two different crimes; and I do not think it possible to bind these up together as one transaction, as was suggested in the able argument of the leading counsel for the appellant. You cannot make them *partes ejusdem negotii*, when so separated in time and place, by the mere fact that the person who committed the perjury on each of these occasions was actuated in both by the same

motive, and had the same improper object in view. I think the criticism upon the terms of the verdict is quite unfounded, and that it must be taken that these words import, as according to their natural signification they do in my opinion, that the jury thereby found the accused guilty of each of the separate charges of perjury in this indictment preferred against them. I shall not refer to the argument founded on the absence of the words *contra formam statuti*, or to that founded on the statute of Geo. 2, or to the argument which we have heard from the learned junior counsel to-day, because these have been entirely disposed of, as the other points in the case have been, by the observations which have already fallen from your Lordships. The last, and what appeared to be the most important consideration which the counsel for the appellant had to urge on his behalf was, that where upon one indictment there are two separate charges *ejusdem generis*, and the prisoner is convicted of both, if there be a statutory limit to the punishment which may be inflicted for one of these offences, that is to be the measure of all the punishment that can be inflicted upon him for more than one offence. So far as I could follow the argument, the learned counsel failed to assign any good reason for that contention. I think he did not dispute that separate cumulative punishments may be awarded, the second to take effect from the date of the expiring of the first sentence. But then it was said, although that is competent, there is an important rule of qualification which you must observe, and that rule is this: if for each offence the statute says that you shall inflict a sentence of not more than seven years' penal servitude, you cannot for the two offences exceed that limit. For that proposition, which seems at first sight a very startling one, and does not in my view lose that upon a closer inspection, no authority whatever was cited. At length at the close of his argument an appeal was made by the learned counsel to an American case, not as an authority, because I take it that the judgment of a Court in New York is not an authority in a case of this kind arising in England, with regard to English rules of procedure in criminal cases, but as showing an argument that ought to convince the House that it ought to come to the same conclusion in the present case as the court in America arrived at in the case of *Tweed v. Lipscombe* (*ubi sup.*). That case, even if it were receivable, does not appear to me to be in the least degree an authority for the proposition in support of which it was quoted. What was decided there, as I understand the case, was that the law of America differs from the law of England; and one of the Judges expressly puts it that because of that difference the English authorities were of no authority in America; and I should have thought that the converse of that proposition would be equally true, namely, that the decisions in America, such being the difference between the laws of the two countries, would be of no authority here. But assuming the case of *Tweed v. Lipscombe* to be an authority, what does it come to? It comes to this; that in prosecutions for misde-

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meanour in America you can only proceed for one offence upon each indictment, and if you desire to have cumulative punishment extending to more than one statutory punishment, you must bring more than one separate indictment. The inference which I draw from the words used by the two learned judges who decided that case is this, that you might have more than one penalty of the full amount tacked together, if you brought separate proceedings for that purpose. But then in England it is not necessary to bring these two separate proceedings in order to try one criminal for a misdemeanour, and I see no reason whatever, even if I accept that decision as law, for holding that if you can tack together two periods of the full amount, one for each offence, when you try by separate indictments, the same may not be done when two offences are tried upon the same indictment. And still further, it appears to me among the cases cited at the bar there is to be found, not only sufficient authority, but ample authority for the proposition that such a sentence is sustainable, and is good according to the law of England. Had there been any serious doubt or difficulty attending these questions of criminal law which have been raised at the bar, I should have given my opinion with very great hesitation and diffidence; but, looking to the very unsubstantial character of the objections which have been stated to this conviction and sentence, I cannot say that I feel the least hesitation in giving my concurrence to the views which have been expressed by your Lordships.

*Judgment appealed from affirmed, and appeal dismissed.*

Solicitor for the appellant (plaintiff in error), *E. Kimber.*

Solicitor for the respondent (defendant in error), *The Solicitor to the Treasury.*

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## NORTH EASTERN CIRCUIT.

NEWCASTLE-UPON-TYNE.

Wednesday, April 27, 1881.

(Before STEPHEN, J.)

REG. v. DAVIS. (a)

*Felonious wounding—Delirium tremens—When a defence.*

*Drunkenness is no excuse, but delirium tremens caused by drinking, and differing from drunkenness, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility.*

**W**ILLIAM DAVIS, thirty-eight, labourer, was charged with feloniously wounding his sister-in-law, Jane Davis, at Newcastle, on the 14th day of January, with intent to murder her.

*Milvain* for the prosecution.

*Steavenson* for the defence.

On the 14th day of January, 1881, the prisoner (who had been previously drinking heavily, but was then sober) made an attack upon his sister-in-law, Mrs. Davis, threw her down, and attempted to cut her throat with a knife. Ordinarily he was a very mild, quiet, peaceable, well-behaved man, and on friendly terms with her. At the police station he said, "The man in the moon told me to do it. I will have to commit murder, as I must be hanged." He was examined by two medical men, who found him suffering from *delirium tremens*, resulting from over-indulgence in drink. According to their evidence he would know what he was doing, but his actions would not be under his control. In their judgment neither fear of punishment nor legal nor moral considerations would have deterred him—nothing short of actual physical restraint would have prevented him acting as he did. He was disordered in his senses, and would not be able to distinguish between moral right and wrong at the time he committed the act. Under proper care and treatment he recovered in a week, and was then perfectly sensible.

For the defence it was submitted that he was of unsound mind at the time of the commission of the act, and was not responsible for his actions.

STEPHEN, J. to the jury: The prisoner at the bar is charged with having feloniously wounded his sister-in-law, Jane Davis, on the 14th day of January last with intent to murder her. You will have to consider whether he was in such a state of mind as

(a) Reported by RICHARD LUCK, Esq., Barrister-at-Law

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to be thoroughly responsible for his actions. And with regard to that I must explain to you what is the kind or degree of insanity which relieves a man from responsibility. Nobody must suppose—and I hope no one will be led for one moment to suppose—that drunkenness is any kind of excuse for crime. If this man had been raging drunk, and had stabbed his sister-in-law and killed her, he would have stood at the bar guilty of murder beyond all doubt or question. But drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case the man is a madman, and is to be treated as such, although his madness is only temporary. If you think he was so insane—that if his insanity had been produced by other causes he would not be responsible for his actions—then the mere fact that it was caused by drunkenness will not prevent it having the effect which otherwise it would have had, of excusing him from punishment. Drunkenness is no excuse, but *delirium tremens* caused by drunkenness may be an excuse if you think it produces such a state of mind as would otherwise relieve him from responsibility. A person may be both insane and responsible for his actions, and the great test laid down in *McNaughten's case* (10 Cl. & Fin. 200; 1 C. & K. 130 n.) was whether he did or did not know at the time that the act he was committing was wrong. If he did—even though he were mad—he must be responsible; but if his madness prevented that, then he was to be excused. As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason may be fairly said to prevent a man from knowing that what he did was wrong. *Delirium tremens* is not the primary, but the secondary consequence of drinking, and both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him from the commission of the act. If you think there was a distinct disease caused by drinking, but differing from drunkenness, and that by reason thereof he did not know that the act was wrong, you will find a verdict of not guilty on the ground of insanity; but if you are not satisfied with that, you must find him guilty either of stabbing with intent to murder or to do grievous bodily harm.

The jury returned a verdict of Not Guilty on the ground of insanity.

The prisoner was ordered to be detained during Her Majesty's pleasure.

## SOUTH-EASTERN CIRCUIT.

IPSWICH ASSIZES.

*Thursday, Feb. 3, 1881.*

(Before Sir H. HAWKINS, J.)

REG. v. HUBBARD.

*Evidence—Declarations under sense of impending death—Subsequent hope of recovery.*

*A declaration made under a belief of impending death was held admissible in evidence, even though the declarant at a later period of the day took a more cheerful view of her position, and thought that she should recover.*

**MURDER.** The prisoner was indicted for the murder of his wife, Priscilla Hubbard, at Ipswich, on the 21st day of December, 1880.

*Carlos Cooper and Blifield* were counsel for the prosecution; and *Sims Reeve and Haggard*, for the prisoner.

In support of the case for the prosecution, the counsel for the Crown tendered in evidence certain declarations of the deceased woman, as dying declarations made by her on the day preceding her death. A body of testimony was adduced which satisfied the learned Judge that the declarations tendered were made by the deceased on the 29th day of December, under the solemn belief that her death was impending.

For the prisoner two witnesses were called, who proved to the satisfaction of the learned Judge that later in the day, after the making of the declarations in question the deceased took a more cheerful view of her condition and thought she would recover.

Upon this evidence the counsel for the prisoner contended, upon the authority of *Rex v. Fagent* (7 Car. & P. 238) (a) and *Rex v. Megson* (9 Car. & P. 418) (b) that the hope of recovery which the

(a) *Reg. v. Fagent*. Indictment for manslaughter. The deceased expressed an opinion (*sic*) that she should not recover, and made a declaration, and subsequently, on the same day, asked her nephew if he thought "she would rise again." Held, per Gaselee, J., after consulting with Lord Denman, C.J., that this declaration was not admissible.

(b) *Rex v. Megson*. Indictment for murder. Two days before the death of the deceased the surgeon told her that she was in a very precarious state; and on the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse, and that she had been in hopes she would get better, but as she was getting worse she thought it her duty to mention what had taken place. Immediately after this she made a statement. Held, per Rolfe, B., that this statement was not receivable in evidence as a declaration in *articulo mortis*, as it did not appear clearly that at the time of making it, the deceased was without hope of recovery.



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deceased entertained after making the declarations rendered those declarations inadmissible.

HAWKINS, Sir H.—I think the declarations are admissible. Their admissibility depends on the state and condition of the deceased at the time those declarations were made, and if they would, as they clearly would, have been admissible had the woman died the instant after they were made, their admissibility is not affected by the fact that subsequently to making them and before she died she had entertained an opinion she would recover.

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## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Tuesday, March 15, 1881.*

(Before GROVE and LINDLEY, JJ.)

SWAN (App.) v. SAUNDERS (Resp.). (a)

*Criminal law—Cruelty to animals—Parrots consigned by railway—Non-supply of water during journey—Parrots not prima facie domestic animals—Jurisdiction of justices—Conviction—12 & 13 Vict. c. 92, s. 26; 17 & 18 Vict. c. 60, s. 3; 32 & 33 Vict. c. 70; 42 & 43 Vict. c. 45, s. 46.*

*Cruelty to an animal, to be within the statute, must cause substantial and unnecessary suffering to the animal. Without evidence of such suffering, to keep parrots for a few hours without water is not an act of cruelty upon which a conviction can rightly follow.*

*Six young parrots were consigned by railway by S. from L. to a customer at D. They were inclosed in a box, in which some Indian corn but no water was put. About ten hours after leaving L. they were found at H., an intermediate place, by the respondent, in a condition which led him to think that they were suffering from being too closely packed, and were generally in a bad condition.*

*The birds were alleged to have drunk a considerable quantity of water when offered to them, and to have seemed refreshed and relieved from pain after the draught.*

*S., the appellant, was summoned before a police magistrate having jurisdiction at H., and was convicted of cruelty to the birds on*

(a) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

*the ground that he had failed to supply them with water for their journey from L. to D.*

*Held, on appeal from the decision of the magistrate, that the conviction was wrong, that the mere non-supply of water for the birds was not sufficient evidence upon which to found a conviction for cruelty; and further, that in default of evidence to that effect, young parrots were not domestic animals within the statutes passed to prevent cruelty to animals.*

*Quære, whether the justices at H. had jurisdiction to try the case.*

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**T**HIS was a case stated under 20 & 21 Vict. c. 43.

On the 1st day of October, 1880, at the Lambeth Police Court, an information was preferred by the respondent against the appellant under sect. 2 of 12 & 13 Vict. c. 92, for that he on the 10th and 11th days of September, 1880, within the district of the Lambeth Police Court, did ill-treat, torture, and cause or procure to be cruelly ill-treated and tortured, six parrots.

On the 14th day of October the matter of the same information came on to be heard in due form, and upon the hearing it appeared as follows:

That the appellant was the foreman to one Cross, a wholesale dealer in foreign birds, &c., in Liverpool.

On the 10th day of September the appellant superintended the packing in a wooden box of six young parrots at Liverpool. The birds were afterwards despatched by his direction by the train leaving Liverpool at 11 p.m., consigned to the purchaser at Dover, Kent, the train for which place would leave Herne Hill station at 10.26 on the morning of the 11th day of September. Some Indian corn was placed in the box in which they were consigned.

At 9.15 on the morning of the 11th day of September the respondent, who was employed by the Society for the Prevention of Cruelty to Animals, observed the box lying on the platform at Herne Hill station.

He observed, through a crevice on the top of the box, that the birds were much torn about, and, as he described, perspiring very freely, and that the three birds at the bottom of the box were being trampled on by the others, and were in a most exhausted condition. He caused the birds to be removed from the box into a larger one, and after they had been supplied with water they seemed to revive, and were forwarded to their destination. He considered that they were too closely packed.

A porter at the Herne Hill station, whose attention had been called to the birds by the respondent, proved that he heard them squeaking and making a peculiar noise, and that one of the servants of the railway company gave them some cold water, of which they drank about two saucers-full with a relish, and did not cry out afterwards, but seemed to be quite happy and contented.

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Upon these facts it was contended, on the part of the appellant, that there was no evidence of cruelty upon which he should be convicted; that these, being foreign, unacclimatised parrots, were not animals within the meaning of the said statute; that no offence had been committed by the appellant within the jurisdiction of the Lambeth Police Court; and that the appellant had not committed any offence.

The magistrate held that the box was of a sufficient size and proper construction, and that the birds were not too closely packed; but he was of opinion that an offence had been committed, and that it was cruelty to send birds during hot weather in the box used by the appellant, without water, on a journey of several hours, and convicted the appellant of the offence, and adjudged him to pay a fine of 10s., together with 2s. for costs.

The magistrate held that the parrots were animals within the meaning of the statute, and that the appellant had committed an offence within the jurisdiction of the said court.

The opinion of the Court was asked whether the above contentions of the appellant were right in point of law, the Court to make such order as to costs as it deemed fit.

By 12 & 13 Vict. c. 92, s. 2 :

If any person shall, from and after the passing of this Act, cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall, for every such offence, forfeit and pay a penalty not exceeding five pounds.

By sect. 14 :

Every complaint under the provisions of this Act shall be made within one calendar month after the cause of such complaint shall arise; and every offence committed against this Act may be heard and determined by any justice of the peace within whose jurisdiction such offence shall be committed in a summary way, upon the complaint of any person, and without any information in writing; and it shall be lawful for any such justice, in all cases where any person complained of shall not be in custody, to summon such person to appear before such justice, or before any other justice of the peace, at a time and place to be named in such summons; and, on the appearance of the party accused, or, in default of such appearance, upon proof of the service of such summons, the said justice, or any other justice who shall be present at the time and place appointed for such appearance, shall proceed to examine into the matter.

By sect. 29 :

The word "animal" shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal.

By 17 & 18 Vict. c. 60, s. 3 :

The words and expressions to which a meaning is affixed by the Act of the twelfth and thirteenth years of Her Majesty, and which are introduced into this Act, shall have the same meaning in this Act; and the word "animal" shall, in the said Act, and in this Act, mean any domestic animal, whether of the kind or species particularly enumerated in clause 29 of the said Act, or of any other kind or species whatever, and whether a quadruped or not.

By 42 & 43 Vict. c. 49, s. 46, sub-s. 3 :

Where the offence is committed on any person, or in respect of any property in or upon any carriage, cart, or vehicle whatsoever, employed in a journey, or on board any vessel whatsoever employed in a navigable river, lake, canal, or inland navigation,

the person accused of such offence may be tried by any court of summary jurisdiction through whose jurisdiction such carriage, cart, vehicle, or vessel, passed in the course of the journey or voyage during which the offence was committed.

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*H. G. Greene* for the appellant.—The conviction was wrong. The magistrate decided wrongly on all the three points raised. First, there was no evidence of cruelty, and there is none disclosed in the case, on which the magistrate could convict. Cruelty has been defined to be unnecessary violence to and abuse of an animal: (*Murphy v. Manning*, 46 L. J. 211, M. C.; L. Rep. 2 Ex. Div. 307.) Mere inconvenience for a short time to these birds resulting from their being sent by railway is not cruelty. Next, these parrots were not, and there was no evidence that they were, domestic animals within the Acts 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60. A parrot, in a wide sense, is an animal, and may in time become domesticated. The statute applies only to domestic animals, and not to wild animals which have been domesticated, such as caged animals, or tame hares or foxes. The birds are not shown in the case to be domestic animals, or to be even domesticated animals, but merely young parrots consigned by a dealer in foreign birds to a customer. Thirdly, there was no offence within the jurisdiction. This case does not come within sect. 14 of 12 & 13 Vict. c. 92. These birds were merely passing through the district of the magistrate; and the cruelty found by the magistrate in sending these birds without water occurred, if at all, at Liverpool.

*Underhill, Q.C.* (*Morton Smith* with him) for the respondent.—The Court in this case is asked virtually to overrule the magistrate's decision upon questions of fact; for the first two points raised are only questions of fact, and have been found by the magistrate against the appellant. These birds were ill-treated and abused, in the opinion of the magistrate, and his finding of cruelty in the case is conclusive. There was evidence of cruelty. A parrot is a domestic animal, and the magistrate has so found it. The case of *Bridge v. Parsons* (32 L. J. 95, M.C.), which was decided on the earlier of the two Acts, is in respondent's favour; and 17 & 18 Vict. c. 60, s. 3, thoroughly supports his contention. Thirdly, the offence committed by the appellant was a continuing one, and could be dealt with by any magistrate within whose jurisdiction the suffering of the animal is discovered. This has been so held under a statute passed to meet cases similar to this: (*Johnson v. Colam*, 10 L. Rep. Q. B. 544.) The continuity of the offence through several jurisdictions does not prevent the offender from being punished in any one of the jurisdictions; and this is brought within the scope of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 46, sub-sect. 3.

*GROVE, J.*—Three points for our decision have been raised in this case. I am of opinion that our judgment must proceed for the appellant on the first two points; as to the third, whether the alleged offence was a continuing offence or not, I had some doubt. I now think, however, that the offence, if any, was a

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continuing offence. The case before us does not set out any reasonable evidence of cruelty under the statutes on the part of the appellant. Cruelty has been defined as the unnecessary abuse of an animal. I should prefer to define the word as unnecessary ill-usage by which the animal substantially suffers. No substantial suffering has been here made out by the evidence before the magistrate. An Act has been cited to us in which the Legislature lays down that thirty hours is the longest period during which cattle are to be kept without water. Whatever my opinion might be as to whether or not that was too long a period, we have no evidence before us to show that parrots suffer much in the hot weather from the want of water, and that they require to be supplied with it during the night time, or within a period of ten hours. Of course it is not impossible that such evidence might be given. Cruelty does not mean any inconvenience or discomfort incidental to travelling from one place to another which may happen to the animal. To keep a bird in September without water for one night is, without frittering away the effect of the statutes, not such cruelty as to be punishable. The box in which the parrots were confined was found to be sufficient for them. The only evidence of cruelty, and ground for conviction by the magistrate disclosed by this case is, that the birds seemed refreshed by the water which they are stated to have drunk with a relish. As to the second point, I do not think these birds were domestic animals within the statutes cited. I do not say that a parrot might not become a domesticated animal when thoroughly tamed and accustomed to the society of human beings, but these were young unacclimatised birds freshly imported into England. They are clearly different from fowls and other poultry, and the evidence goes to prove that they were not tamed and domesticated. Lastly, I am inclined to think that if there had been any offence it would have been a continuing offence. If an animal is put in such a position that it might inflict great pain upon it, and the circumstances are such that it is reasonable to suppose that the position will not be altered, as long as and wherever that position is maintained, it is a continuing offence.

LINDLEY, J.—As to the first two points, that such sufficient cruelty as to convict has not been made out in the case, and that these parrots were not domestic animals under the statutes, I concur with the judgment of my brother Grove; but on the question of jurisdiction I have grave doubts as to whether the magistrate had jurisdiction in this case by reason of the alleged offence being a continuing one. In the case of *Johnson v. Colam* (*ubi sup.*) the continuing offence was an omission on the part of the appellant to make an application at different watering places for water for the purpose of watering his cattle, a state of things different from that now before us. The decision of this point is, however, not material to our judgment.

*Appeal allowed with costs.*

Solicitors for the appellant, *Last and Sons*, for *Banell, Rodway*, and *Banell*, Liverpool.

Solicitor for the respondent, *A. Leslie*.

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## HIGH COURT OF JUSTICE.

### QUEEN'S BENCH DIVISION.

*Friday, May 13, 1881.*

(Before Lord COLERIDGE, C.J., FIELD and BOWEN, JJ.)

REG. v. DUNCAN. (a)

*New trial — Indictment — Obstruction of highway — Acquittal — Practice and jurisdiction.*

*Upon the trial at assizes of an indictment for obstructing a highway, removed by certiorari into the Queen's Bench Division, the jury came to a special finding, upon which a verdict of not guilty was entered. A rule nisi for a new trial, on the grounds of improper admission of evidence, misdirection, and the verdict being against the weight of evidence, having been obtained by the prosecutor :*

*Held, that it was contrary to the established practice of the court to grant a new trial when the defendant has been in peril of imprisonment ; and that it was therefore not within its jurisdiction to make this rule absolute.*

THIS was an indictment for obstructing a highway which had been removed by *certiorari* into the Queen's Bench Division, and tried at Winchester during the last Winter Assizes by a special jury before Baggallay, L.J. The main question disputed upon the evidence was whether the place upon which the defendant had admittedly built an obstruction had ever been a public road.

The jury found that there was once a road at this place, but that the improvements which the defendant had made were not a material damage to the public.

The counsel on each side claimed this finding as a verdict for their respective clients, and the counsel for the prosecution further claimed that this finding should be entered as a special verdict, but at the learned Judge's direction a verdict of Not Guilty was entered upon the record.

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.



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New trial.*

On the 28th February *Collins*, Q.C., for the prosecution, obtained a rule *nisi*, calling upon the defendant to show cause why the verdict obtained for him at the last Winter Assizes holden at Winchester in and for the county of Southampton, should not be set aside, and a new trial had upon the grounds (1) That the learned judge improperly admitted evidence to the effect that the said defendant had improved certain roads and fences, being no part of the road in dispute; (2) That the learned judge misdirected the jury in telling them that they might take into consideration the alterations and improvements made by the defendant to another road, when they were considering the question whether the road, the subject of the indictment, was obstructed or materially obstructed; and (3) That the verdict was against the weight of evidence.

*Charles*, Q.C. and *Bullen*, for the defendant, showed cause.—Obstructing a highway is an offence for which the punishment is a fine or imprisonment, or both. This is a case, therefore, within the rule of practice that there can be no new trial in a criminal proceeding after a verdict of not guilty. In *Reg. v. Russell* (3 E. & B. 942), upon an indictment for obstructing a navigation, the jury found that the defendant's erection, although a nuisance, was not sufficiently so to render the defendant criminally liable, and the judge directed an acquittal. That is practically the same as the finding of the jury here. The Court of Queen's Bench discharged a rule *nisi* for a new trial, and Lord Campbell said (p. 950): "The ground of my decision is, that this is a criminal proceeding, and that the defendant ought not to be twice put in peril for the same cause. That rests upon a maxim of English law, which will, I hope, always be held sacred. I, for my own part, reprobate the recent speculations as to the propriety of granting a new trial after acquittals for felony and murder. If there be an improper conviction, it should be set aside, but I hope the same practice will never prevail in the case of an acquittal." This decision was approved and followed in *Reg. v. Johnson* (2 E. & E. 613), an alleged obstruction to a highway, although the Judge, who tried the indictment, reported his dissatisfaction with the verdict of acquittal.

*Collins*, Q.C. and *Warry*, for the prosecution, supported the rule.—In both the cases upon which the defendant relies, an exception is expressed with regard to misdirection of the judge at the trial; here the rule has been obtained on the grounds of improper reception of evidence and of misdirection. [Lord COLERIDGE.—But how can we consider those grounds?] It seems to have been the practice as far back as 1802 to grant new trials upon acquittals in cases of non-repair: (*Rex v. West Riding of Yorkshire*, 3 East, 354.) And in *Reg. v. Chorley* (12 Q. B. 515) a rule for a new trial was made absolute where the defendants were acquitted upon an indictment for obstructing a highway. [Lord COLERIDGE.—It appears, however, that the rule was amended to the form of staying the judgment, upon a

doubt concerning this very question.] There is a reference in *Reg. v. Chorley* to the case of *Reg. v. Leigh* (10 A. & E. 398) where this question arose, and a new trial was granted. [Lord COLERIDGE.—That was a case of non-repair. There is no case apparently of a new trial where there had been an acquittal upon a charge which might have resulted in imprisonment.]

*Charles*, Q.C. called attention to *Reg. v. Scaife* (17 Q. B. Div. 238 and 18 Q. B. Div. 773), where there was a new trial upon an acquittal even of felony; but that case was peculiar, and is in effect overruled by *Reg. v. Bertrand* (L. Rep. 1 P. C. 520).

Lord COLERIDGE, C.J.—I think we cannot interfere in this case. The practice in matters of this kind seems to have been settled for centuries, and, in my opinion, we have no jurisdiction to alter it. With one single exception, no new trial has ever been granted, as far as we can find, where a defendant has been at his first trial in peril of imprisonment. The single exception is *Reg. v. Scaife*, which was a case for felony; but not, I think, on that account of any greater or less weight as an authority here. The Court of Queen's Bench, consisting of Lord Campbell, Patteson, Coleridge, and Erle, JJ., made a rule absolute for a new trial on an indictment for robbery with violence, which had been removed by *certiorari* from quarter sessions to the assizes. There were three prisoners, and two of them had been convicted; the third, who had been acquitted, had procured the absence of one of the witnesses, whose deposition was read against all the prisoners. The new trial took place at the quarter sessions, and all three prisoners were convicted and sentenced to ten years' transportation. This case, however, was considered at great length in *Reg. v. Bertrand*, an appeal in a case of felony from New South Wales; and Sir John Coleridge, who delivered the judgment of the Privy Council, expressed disapproval and regret in respect of the Queen's Bench decision in which he had taken part, and declined to follow it. Further, it has never been followed in the practice of this Court, and I think we may now consider that it is entirely overruled. The motion for a new trial in the present case is therefore absolutely without authority; and although of course the Legislature may think fit to alter the long established practice of this Court, and to give power to grant a new trial in a criminal matter after an acquittal, yet it seems to me that we have no jurisdiction to do anything but carry out the unbroken rule of practice.

FIELD and BOWEN, JJ., concurred.

*Rule discharged.*

Solicitors for prosecution, *Knight and Ward*.

Solicitors for defendant, *Swann and Co.*, for *Foster*, Aldershot.

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*v.*  
*DUNCAN.*  
—  
1881.

*Obstructing*  
*highway—*  
*Acquittal—*  
*New trial.*

## COURT OF CRIMINAL APPEAL.

*Saturday, May 21, 1881.*

(Before Lord COLERIDGE, C.J., GROVE, HAWKINS, LOPES, and  
STEPHEN, JJ.)

REG. v. HARPER. (a)

*Forgery—Bill of exchange—Inchoate instrument—Indictment.*

*The prisoner was indicted in the first count for forging and uttering an indorsement on a bill of exchange, in the second count on a paper writing in the form of and purporting to be a bill of exchange, and in the third count on a certain paper writing.*

*The facts were these: the prosecutor wrote the body of a bill of exchange, but without signing the drawer's name, and sent it to the prisoner, who was to accept it and procure an indorsement by a solvent person, and return it to the prosecutor. The prisoner accepted it, and forged the indorsement of another person's name, and returned it.*

*Held, that the prisoner could not be convicted upon this indictment, as the document was only an inchoate instrument of no value when the prisoner forged the indorsement.*

**J**OHAN HARPER was convicted of forgery before me at the Durham Assizes, under the following circumstances:

Messrs. Watson and Son, of Kilmarnock, having supplied Harper with some machinery, drew a bill upon him for the price, and forwarded it to him for acceptance, unsigned by the drawers. It had been arranged that Harper should procure the indorsement of a solvent person, and should himself accept the bill. Harper returned it accepted by himself, and purporting to be indorsed by one Hunt. It was proved that Hunt's indorsement had been forged by Harper. On getting the bill back Watson and Son indorsed it, and paid it into the bank for collection when due. They did not at any time sign it as drawers. The following is a copy of the bill of exchange.

22*l.* 10*s.* 4*d.*—Kilmarnock, Nov. 2, 1880.

One month after date pay to me or order the sum of 22*l.* 10*s.* 4*d.*, that being for value received in machinery.

Mr. J. Harper, Contractor and Builder, Rutland-street, Pallion, Sunderland.  
Indorsed, John Hunt, John Watson and Son. Accepted payable at the Union Bank of London, John Harper.

The indictment contained six counts, which charged Harper:

1. With feloniously forging a certain indorsement to and on a bill of exchange.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

2. With feloniously forging an indorsement to and on a certain paper writing, which said paper writing is in the form of and purports to be a bill of exchange unsigned by any drawer thereof.

3. Feloniously forging a certain indorsement to and on a certain paper writing.

In the 4th, 5th, and 6th counts, he was charged with feloniously uttering the documents described in the 1st, 2nd, and 3rd counts.

I was of opinion that all the counts were bad except the first and fourth, but I left the whole matter to the jury.

The jury returned a general verdict of guilty, and I sentenced Harper to be imprisoned with hard labour for nine months, but suspended the execution of the sentence till the decision of this case by the Court for Crown Cases Reserved.

The question for the Court is whether under the circumstances stated Harper was properly convicted of either of the offences charged in the first or fourth counts of the indictment, and whether any of the other counts charge a felony.

J. F. STEPHEN.

No counsel appeared to argue on either side.

Lord COLERIDGE, C.J.—The court is of opinion that the conviction on this indictment cannot be supported. The prisoner was convicted generally of forging an indorsement on a bill of exchange. All the counts of the indictment were for forging an indorsement on a bill of exchange, or on a paper writing in the form of and purporting to be a bill of exchange, or on a certain paper writing. The document, however, was but an inchoate bill of exchange. A bill of exchange was formally drawn upon and sent to the prisoner for his acceptance, and he was to accept it and to procure the indorsement of a solvent person to it, but there was no drawer's name attached to the bill. The prisoner returned the bill accepted by himself, and with the name of Hunt as the indorsee upon it, but he had forged Hunt's indorsement. Under these circumstances the prisoner cannot be convicted upon this indictment, for this document was clearly not a bill of exchange. In *McCull v. Taylor* (34 L. J. 365, C. P.) it was held that an instrument in the form of a bill of exchange, addressed to and accepted by the defendant, but without the names of either a payee or drawer, is neither a bill of exchange nor a promissory note, but only an inchoate instrument. In that case Erle, C.J. said: "The instrument has no date and no drawer's name, but the defendant wrote his acceptance across it, and the question is, has the holder of such an instrument a right to declare on it, either as a bill of exchange or promissory note? It certainly is not a bill of exchange, nor is it a promissory note. It is in fact only an inchoate instrument, though capable of being completed." Erle, C.J. further cited the case of *Stoessiger v. South-Eastern Railway Company* (3 El. & B. 549; 23 L. J. 549, Q. B.) as in point. In that case the question arose whether a document in the form of a bill of

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Inchoate  
instrument.

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—  
*Forgery—  
Inchoate  
instrument.*

exchange for 11l. 10s., but which had no drawer's name upon it, was a bill note or security for the payment of money exceeding 10l. within the Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68, s. 1), and it was held that it was not. In this case we are clearly of opinion that this was a mere inchoate instrument, of no value in the shape in which it was when the prisoner wrote the indorsement upon it. This is quite clear, as well upon principle as upon the authorities.

GROVE, HAWKINS, and LOPES, JJ. concurred.

STEPHEN, J.—Although I agree with the rest of the court that this conviction should be quashed, yet it seems to me that this case has all the effects of forgery, and I think that the prisoner would not have been relieved from them if he had been indicted for forgery at common law.

*Conviction quashed.*

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## Ireland.

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### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

*Wednesday, May 4, 1881.*

(Before O'BRIEN, and FITZGERALD, JJ.)

THE QUEEN v. McNAUGHTEN, DONNELLY, AND HAYES. (a)

*Application for bail in a charge of murder—Unlawful assembly—  
Duty of police-officers—Right of next of kin of deceased person  
to be heard.*

*In a case of homicide the next of kin of the deceased have no legal  
right to be heard, but ex gratiâ the court may hear them.*

*Per Fitzgerald J.: If parties assemble to obstruct the officers of the  
law, all parties so assembling are guilty of an unlawful assembly  
whether a riot takes place or not, and if a homicide takes place  
in consequence of that unlawful assembly, every one taking a  
part in the unlawful assembly may be himself personally  
responsible for the homicide.*

**M**OTION to admit to bail sub-constables Donnelly, McNaughten,  
and Hayes, at present confined in Sligo goal, Donnelly and

(a) Reported by ORRIL R. ROOME, Esq., Barrister-at-Law.

McNaughton on the charge of wilful murder and Hayes of manslaughter. The facts as appeared from the depositions of the accused before the coroner were as follows. The accused were sub-constables in the Royal Irish Constabulary, and on the 2nd day of April, 1881, were proceeding on duty accompanied by a constable named Armstrong, to protect a person named Broder, who was about to serve ejectment processes. They had proceeded some distance on their road, when they were met by a crowd of women, and a little to the rear of the women was a large crowd of men, numbering about 200, one woman named Regan making herself a sort of ring-leader. She said they did not want to do any harm to the police, all they wanted was to get the processes from Broder. Constable Armstrong came forward, took the woman by the arm, and said if she did not cease the conduct of which she was guilty she would be lodged in jail. A stone was then thrown from the crowd which struck Broder on the knee. Constable Armstrong then advanced from his comrades, and went into the crowd for the purpose of arresting the man who had thrown the stone. He was immediately surrounded by the mob, and his rifle was seized. His rifle went off in the *melée* that ensued, and in three or four minutes Armstrong was left senseless on the road suffering from injuries from the effects of which he shortly after died. Hayes rushed into the crowd at imminent risk to himself, and having got through the crowd, and got some little distance when the first attack was quite over, he was followed by a crowd of four or five men who again attacked him, and one raised a stone some seven pounds weight, and threatened to dash out his brains. He was stripped of his rifle, his belt, his pouch, and shako, and but for the intervention of a woman who was there his life would have been taken. For the purpose of rescuing constable Armstrong the other two constables Donnelly and McNaughton did fire upon the crowd. All the sub-constables swore they received no directions from the constable to fire at all; it was not until his life was in imminent danger that they fired the shots to protect him. It appeared from the testimony of other persons who saw the pouches of the men when they came home, that only one cartridge was missing from their respective pouches, that there were marks of stones upon their rifles, their coats were torn inside out, and they had nothing on their heads.

The evidence submitted below on behalf of the prosecution was that of four women who deposed that there were not more than fifty men present, that they had no sticks and no stones, and that some shouts were raised by some children, when the constabulary, without any provocation, fired on the crowd and killed two persons. The coroner's jury found a verdict of wilful murder against Donnelly and McNaughten, and manslaughter against Hayes for the homicide of one Corcoran, who was killed on the occasion.

Monroe, Q.C. (with him *Bird*) for the prisoners, moved that the prisoners be admitted to bail.

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Bail—Homicide—Unlawful assembly.



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Bail—Homicide—Unlawful assembly.

*John Naish*, Q.C., on behalf of Her Majesty's Attorney-General offered no opposition to the prisoners being admitted to bail.

*Peter O'Brien*, Q.C., with him *John A. Curran* for the next of kin of the deceased man *Corcoran*.

*Monroe*, Q.C., objected to his being heard; those representing the next of kin of the deceased have no *locus standi*.

*O'Brien*, Q.C.—In *Reg. v. Rumble and Bonello* (Ir. R. 3 C. L. 271), counsel for the next of kin were heard in opposition to the application for bail, *Whiteside*, C.J. *dissentiente*. Counsel for the next of kin were heard in *Re Oasey*, the Six-mile-bridge case (6 Cox C. C. 122.)

FITZGERALD, J.—Is there any case where the Attorney-General has come into court, and expressed his acquiescence on the part of the Crown to the party being discharged, that the next of kin were heard. On the bail motion in the Six-mile-bridge case I was for the next of kin, and was heard *ex gratiâ* only, not as a matter of right. We will hear you now, but only *ex gratiâ*.

O'BRIEN, J.—I would not go further than that.

*Bird*, for the prisoners, was not called on to reply.

O'BRIEN, J. expressed his opinion that the prisoner should be admitted to bail.

FITZGERALD, J.—In concurring that the motion ought to be acceded to, I was prepared to go considerably further and say that the defendants ought to be discharged upon their own recognizances without giving bail at all. I do not propose to go into the minute facts of the case and discuss the discrepancies of the evidence. When a transaction of this kind takes place every witness probably gives his own account of what actually occurred in his own presence, and what he saw himself, and you will always find amongst the most truth-telling witnesses these discrepancies. But we have to look at the broad facts of the case, and one of the advantages of a coroner's inquest is that we have the evidence on both sides. The man *Broder* was there serving the process of the law; he was there upon a peaceful and lawful occupation. I collect from the depositions that upon some previous occasion it was found necessary to protect *Broder*. The four policemen were there in pursuance of a paramount duty, and were ordered to protect *Broder*, they were bound to protect him, and were authorised to use force in so doing if necessary. This crowd were there evidently for the purpose of obstructing *Broder* and the officers of the law. The police had a duty to perform in protecting the process server. It ought to be known that if persons assemble to obstruct the officers of the law, all parties so assembling are guilty of an unlawful assembly, whether a riot takes place or not, and if a homicide takes place in consequence of the unlawful assembly every one taking a part in the obstruction may be himself personally responsible for that homicide. I cannot doubt that the police were justified in using force to repel force. We have before us the depositions of these women, and of

the three constables, and I do not hesitate for a moment to say that if the constables are to be believed (and I shall add I see no reason to disbelieve them) they have proved a case not of crime on their part, but of justifiable homicide. And furthermore I have to add to this, that if the case made by these witnesses is a true one there was an unlawful assembly there on the part of what has been called the people, and every one taking part in that unlawful assembly is responsible for the homicide. A great deal has been said about forbearance by the police, it is not forbearance towards the rioter which is meant by the expression, it is forbearance that ought to be exercised by officers of the law, lest in repelling outrage, they may take the lives of innocent people, and it too frequently happens it is the innocent that perish.

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The defendants were admitted to bail on their own recognizances of 100*l*.

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### HIGH COURT OF JUSTICE.

#### QUEEN'S BENCH DIVISION.

June 2 and 3, 1881.

(Before O'BRIEN, FITZGERALD, and BAREY, JJ.)

THE QUEEN v. WALTER AND JOHN PHELAN. (a)

*Change of venue—Murder—Popular feeling in the locality—Subscription by persons on the jury panel to a fund to defend the prisoners—Imposition of terms on the Crown.*

*In an indictment for murder the trial had twice been ready for hearing; once in the local venue where the alleged crime was committed, and once in the venue fixed by the Winter Assizes Act. On both these occasions the trial was postponed on the ground that an impartial trial could not be had; it appearing on affidavit that large numbers of the jurors who would try the case, were members of an association called "The Land League," which association had subscribed to the defence of the prisoners, the crime being of an agrarian nature. The venue was now changed from the local one to a district where it appeared proba-*

(a) Reported by OEOIL R. ROOHE, Esq., Barrister-at-Law.

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1881.

Charge of  
murder—  
Change of  
venue.

*ble a fair and impartial trial could be had, the Crown being put under terms to expedite the hearing of the case, and to pay the costs to the accused persons necessarily incurred by the change of venue.*

**I**N this case the prisoners, Walter Phelan and John Phelan, were indicted for the wilful murder of Charles Daniel Boyd, at Shanbogh, New Ross, in the county Kilkenny, on the 8th day of August, 1880. The present application was on the part of the Crown to enter a suggestion on the record that the venue should be changed to Dublin. The affidavits of Mr. Bolton, the Crown solicitor, and Mr. Webb, the sub-inspector of constabulary, stated that from the result of their inquiries they were of opinion the crime was of an agrarian nature. The prisoners dwelt on the lands of Mr. Boyd, senior, the father of the deceased man, and unfriendly relations existed between Mr. Boyd, senior, and the prisoners' family. Considerable excitement existed in the county Kilkenny with reference to the relations of landlord and tenant. There were branches of an association known as the Land League established in the County Kilkenny, and the central body of this league subscribed 40*l.* for the defence of the prisoners, besides a local subscription to which many persons resident in the county subscribed. The case came before the Winter Assizes at Waterford in December, 1880, when it was adjourned, on the ground that a fair and impartial trial could not be then had at Waterford. At the Spring Assizes at Kilkenny, in 1881, a similar application for an adjournment was made and granted. It appeared that on the panel by which it was proposed to try the case there were no less than 111 persons who were members of the Land League. The remaining facts are sufficiently set forth in the judgment of the court.

*W. Ryan, Q.C., with him Naish, Q.C., and Anderson, for the Crown, moved that a suggestion be entered on the record that the venue be changed to Dublin. They relied on Reg. v. Barrett (Ir. Rep. 4 C. L. 285) ; Reg. v. Palmer (5 El. & Bl. 1024) ; Rex v. Hunt and others (3 B. & Ald. 444). In Rex v. Holden (5 B. & Ad. 347), although the venue was not changed, the general principle is thus laid down by Lord Denman : " I apprehend that the power of changing the place of trial, whenever it is necessary, for the purpose of securing as far as possible a fair investigation, is a part of the jurisdiction of this Court, and that the power may be exercised where it is absolutely necessary in cases of felony : " Reg. v. Conway (7 Ir. C. L. Rep. 518).*

*Hemphill, Q.C., with him Peter O'Brien, Q.C., and David Lynch, for the prisoners, contra.—In Rex v. Harrison (3 Burr. 1830) Lord Mansfield, C.J. lays down the dictum that before the venue is changed the Court must be satisfied that there is no possibility of a fair trial in the proper county : (Reg. v. Fay, Ir. Rep. 6 C. L. 436.)*

The judgment of the Court was delivered by

FITZGERALD, J.—The duty of this Court is to see that the case should be tried in a place where a fair and impartial trial can be had. By fair and impartial I mean a trial resulting in a true verdict whether of guilt or innocence. As to the allegation that a fair and impartial trial could not be had in Kilkenny, the meaning of it is, not that it would not be possible to have a fair and impartial trial there, but that it is not likely that such a trial could take place there. I carefully abstain from expressing any opinion upon the strength or weakness of the case against the prisoners, or as to whether they are the proper persons against whom to make this charge, but there can be no doubt that a dreadful crime has been committed. I recollect the occasion well, I was opening the assizes in Wicklow, and had congratulated the grand jury on the fact that the existing condition of things appeared to be satisfactory. I had hardly uttered the last words of my charge when the news arrived of the outrage, and murder of young Mr. Boyd. Soon afterwards the prisoners were arrested, and the next thing in point of time was the letter of the Rev. Patrick Furlong addressed to the National Land League soliciting a subscription for their defence. While I give credit to the reverend gentleman for sincerity and charity of purpose, I must say he has shown himself singularly indiscreet. He was a Catholic clergyman of position and influence, and as such his words were entitled to peculiar weight. In his letter the reverend gentleman pledged himself to the belief that the parties charged were innocent of the crime. I do not mean to say that Mr. Furlong did not entertain such a belief, but the expression of it was of formidable import to the neighbourhood. Mr. Furlong also said, what was quite right and proper, that the prisoners were men of good character, but he added that they lived “under a not over merciful landlord.” In that I think he made another exhibition of want of discretion. This letter was written three months before the Waterford Winter Assizes, the letter was published in the *New Ross Standard*, and on the 18th day of September there appeared in that journal an article highly calculated to prejudice the fair trial of the case. On the 2nd day of October a committee was appointed to organise a fund for the defence, and fifty-nine persons were appointed as collectors for a perfectly legitimate object, to secure legal aid for the prisoners. But the proper parties to try a case are certainly not those who subscribed for any of its purposes, and especially when their subscriptions were asked for in the words of the letter of Mr. Furlong, who spoke of his belief in their innocence, and described the father of the murdered man as a “not over merciful landlord.” The prisoners were committed for trial, and true bills were found at Waterford, but an application was made to the judge who presided to postpone the trial. On the grounds stated the Judge would have forgotten his duty to the public if he had hesitated

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*Charge of  
murder—  
Change of  
venue.*

for one moment in acceding to the application. On the opening of the Spring Assizes at Kilkenny the Crown found that on the panel, the total number of which was not stated, there was no less than 111 names of men who were members of the Land League. Affidavits were made as to the state of the panel, and the impossibility under the circumstances of obtaining a fair and impartial trial, and again there was a postponement. The case now comes before the court, in a singular and unusual point of view which is not to be forgotten. One Judge condemned the panel at Waterford as unfit, and the judge at Kilkenny told them that with the panel before him, it was impossible to obtain a fair and impartial trial. It has been said that this was not a crime of an agrarian character. That is a matter as to which the Court must be guided by the opinions of experienced men who are acquainted with the local circumstances. Here we have the Crown solicitor and the sub-inspector of constabulary stating as a result of their inquiries that the crime was of an agrarian character, the murdered man being the son of a man who was described as a not over merciful landlord. With these facts before it, the Court has now to say whether, having regard to the due administration of justice, and to its bounden duty, to secure as far as in it lies a fair and impartial trial, the case ought to be tried in the local venue. We have at least to say that it ought to be tried before some fair and impartial tribunal. In this view we hold that it ought not to be tried in Wexford, Waterford, or Kilkenny. Then where is the trial to take place? The circumstances render the case one that shows it ought to come to Dublin. While holding this view the Court consider there are terms which we should impose upon the Crown. The defendants if they are not brought to trial at the next Kilkenny Assizes will be entitled to unconditional discharge under the Habeas Corpus Act. If the order of the Court is now to go, they must be brought to trial in Dublin during the present sittings; and the Crown must pay all the expenses reasonably and necessarily incurred in consequence of the trial not taking place in Dublin.

BARRY, J., concurred.

O'BRIEN, J., although not dissenting, declined to concur with the judgment of the court.

*Venue changed to Dublin.*

## COURT OF CRIMINAL APPEAL.

*Saturday, June 18, 1881.**(Before Lord COLERIDGE, C.J., GROVE and DENMAN, JJ., HUDDLESTON, B., and WATKIN WILLIAMS, J.)*

REG. v. JOHANN MOST. (a)

*Murder—Encouraging or persuading to—Newspaper article—  
24 & 25 Vict. c. 100, s. 4.**The defendant wrote and published an article in a newspaper in London, which was sold to the public, and also circulated among subscribers, which article the jury found was intended to, and did encourage, and was an endeavour to persuade persons to murder foreign potentates, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article.**Held, that the defendant was guilty of a misdemeanour within sect. 4 of the 24 & 25 Vict. c. 100.*

CASE reserved for the opinion of this Court by Lord Coleridge, C.J.

Johann Most was tried before me at the Central Criminal Court on the 25th day of May, on an indictment containing twelve counts. The first two counts contained charges of publishing a scandalous libel at common law; and on these counts a separate verdict of guilty was taken, and no question arises upon them.

The remaining ten counts charged the prisoner with offending against 24 & 25 Vict. c. 100, s. 4. The subject matter of all the counts was the same publication, which was treated as a common law libel in the first two counts, and as an offence against the statute in the remaining ten. It was an article written in German, in a newspaper entirely in that language, but published weekly in London, and enjoying an average circulation of 1200 copies. The prisoner was proved to be the editor and publisher of the paper. Several copies of the paper were proved to have been bought at his house, and some copies of a reprint of the article in question were actually sold by the prisoner himself to one of the witnesses called on behalf of the Crown.

It is not necessary to set out the article at length, but it contained amongst others the following passages :

\* \* \* \* \*

Like a thunderclap it penetrated into princely palaces where dwell those crime-beladen abortions of every profligacy who long since have earned a similar fate a thousand-fold.

\* \* \* \* \*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



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*Inciting to  
murder—  
Newspaper  
article.*

Nay, just in the most recent period they whispered with gratification in each others' ears that all danger was over, because the most energetic of all tyrant-haters, the "Russian Nihilists," had been successfully exterminated, to the last member.

Then comes such a hit.

William, erewhile Canister-shot Prince of Prussia, the new Protestant Pope and Soldier Emperor of Germany, got convulsions in due form from excitement. Like things happened at other Courts.

At the same time, they all know that every success has the wonderful power, not only of instilling respect, but also of inciting to imitation. There they simply tremble then from Constantinople to Washington for their long since forfeited heads.

When, in many countries, old women only, and little children, yet limp about the political stage with tears in their eyes, with the most loathsome fear in their bosoms of the castigating rod of the State night watchman now, when real heroes have become so scarce, such a Brutus deed has the same effect on better natures as a refreshing storm.

To be sure, it will happen once again that here and there even Socialists start up, who, without that anyone asks them, assert that they, for their part, abominate regicide, because such an one after all does no good, and because they are combating, not persons, but institutions. This sophistry is so gross that it may be confuted in a single sentence. It is clear, namely, even to a mere political tyro, that State and social institutions cannot be got rid of until one has overcome the persons who wish to maintain the same. With mere philosophy you cannot so much as drive a sparrow from a cherry tree, any more than bees are rid of their drones by simple humming.

On the other hand, it is altogether false that the destruction of a prince is entirely without value, because a substitute appointed beforehand forthwith takes his place.

What one might in any case complain of, that is only the rarity of so-called tyrannicide. If only a single crowned wretch were disposed of every month, in a short time it should afford no one gratification henceforward still to play the monarch.

But it is said, "Will the successor of the smashed one do any better than he did?" We know it not. But this we do know, that the same can hardly be permitted to reign long if he only steps in his father's footsteps.

Meanwhile, be this as it may, the throw was good; and we hope that it was not the last.

May the bold deed, which, we repeat it, has our full sympathy, inspire revolutionists far and wide with fresh courage.

The 4th section of 24 & 25 Vict. c. 100, is as follows :

All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not more than ten and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

The ten counts framed upon this section all charged the prisoner with having "encouraged" or "endeavoured to persuade" persons to "murder other persons," some named and others not named, who were in all cases not subjects of Her Majesty, nor within the Queen's dominions.

The 3rd and the 9th, 10th, 11th, and 12th counts, so far as material to the present question, were as follows (they may be

taken as specimens of the intermediate counts, which were in their legal incidence the same) :

Count 8.—And the jurors aforesaid, upon their oath aforesaid, further present that heretofore, to wit, on the 19th day of March, in the year of our Lord 1881, the said Johann Most unlawfully, knowingly, wilfully, and wickedly did encourage certain persons, whose names to the jurors aforesaid are unknown, to murder certain other persons, to wit, the sovereigns and rulers of Europe, not then being within the dominions of our said Lady the Queen, and not being subjects of our said Lady the Queen, against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Count 9.—And the jurors aforesaid, upon their oath aforesaid, further present that heretofore, to wit, on the 19th day of March, in the year of our Lord 1881, the said Johann Most unlawfully, knowingly, wilfully, and wickedly did encourage certain persons whose names are to the jurors aforesaid unknown to murder a certain other person, to wit, His Imperial Majesty Alexander the Third, Emperor of all the Russias, not then being within the dominions of our said Lady the Queen, and not being a subject of our said Lady the Queen, against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Count 10.—And the jurors aforesaid, upon their oath aforesaid, further present that heretofore, to wit, on the 19th day of March, in the year of our Lord 1881, the said Johann Most unlawfully, knowingly, and wickedly did endeavour to persuade certain persons whose names are to the jurors aforesaid unknown to murder a certain other person, to wit, his Imperial Majesty Alexander the Third, Emperor of all the Russias, not then being within the dominions of our said Lady the Queen, and not being a subject of our said Lady the Queen, against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Count 11.—And the jurors aforesaid, upon their oath aforesaid, further present that heretofore, to wit, on the 19th day of March, in the year of our Lord 1881, the said Johann Most unlawfully, knowingly, wilfully, and wickedly did encourage certain persons whose names to the jurors aforesaid are unknown to murder a certain other person, to wit, his Imperial Majesty William the First, Emperor of Germany, not then being within the dominions of our said Lady the Queen, and not being a subject of our said Lady the Queen, against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

Count 12.—And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on the 19th day of March, in the year of our Lord 1881, the said Johann Most unlawfully, knowingly, wilfully, and wickedly did endeavour to persuade certain persons whose names to the jurors aforesaid are unknown to murder a certain other person, to wit, his Imperial Majesty William the First, Emperor of Germany, not then being within the dominions of our said Lady the Queen, and not being a subject of our said Lady the Queen, against the form of the statute in that case made and provided, and against the peace of our said Lady the Queen, her crown and dignity.

The evidence in support of these counts was the same as that in support of the first and second counts; and the only encouragement and endeavour to persuade proved was the publication of the libel.

I directed the jury that if they thought that by the publication of the article the defendant did intend to and did encourage or endeavour to persuade any person to murder any other person, whether a subject of Her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find the prisoner guilty upon the last ten counts, or such of them as they thought the evidence supported. The jury convicted the prisoner upon all the ten counts,

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*Inciting to  
murder—  
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article.*

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*Inciting to  
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article.*

and there was abundant evidence to justify them if my direction was correct.

Entertaining, however, some doubt as to the correctness of my direction, I deferred sentencing the prisoner, and I have now to request the opinion of the Court of Criminal Appeal whether such direction was correct in point of law or not.

If the Court of Appeal thinks the direction correct, the conviction on those ten counts is to be affirmed; if otherwise, the conviction on those ten counts is to be quashed.

*A. M. Sullivan* for the prisoner.—The conviction upon the counts framed upon sect. 4 of the 24 & 25 Vict. c. 100, is wrong. It is conceded that this was the publication of a seditious libel, but that is a different offence to that contemplated by sect. 4. The present case is totally outside of that enactment. Before the Act persons might be indicted for libels in this country on foreign sovereigns, as in the case of Peltier for a libel on the Emperor Napoleon I. The scope of sect. 4 is conspiracy to murder; it may and does contemplate a personal transaction between the accused and some one else, for the words of sect. 4 ("who shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person") mean who shall solicit, &c., some particular person, and not who shall do any of these acts by writing an article in a newspaper addressed to the public in general. Sect. 4 of the 24 & 25 Vict. c. 100, was copied from an Irish Act of Parliament (36 Geo. 3, c. 27), "An Act to make conspiring to murder felony without benefit of clergy," which, after reciting that, "whereas it was necessary, in order to deter men from entering into conspiracies to murder, to increase the punishment of persons convicted of such horrid crimes," enacted that all persons who shall be by due course of law convicted of conspiring, confederating, and agreeing to murder any person, shall "be and be adjudged felons, and shall suffer death as felons without benefit of clergy." That Act was amended by the 38 Geo. 3, c. 57 (Irish), which further enacted, "that any person or persons who shall propose to, solicit, encourage, or persuade, or endeavour to encourage or persuade any person or persons to murder any person, and shall be thereof by due course of law convicted, shall be and be adjudged guilty of felony, and shall suffer death as in cases of felony without benefit of clergy." Then the 10 Geo. 4, c. 34, "An Act for consolidating and amending the statutes in Ireland, relating to offences against the person," was passed. That repealed the above statutes of 36 and 38 Geo. 3, and by sect. 8 made conspiracy to murder a capital felony, and by sect. 9 re-enacted "that every person who shall solicit, encourage, or persuade, or endeavour to persuade, or who shall propose to any person to murder any other person, shall be guilty of felony, and being convicted thereof shall suffer death as a felon." So that it is clear that sect. 4 of the 24 & 25 Vict. c. 100, was framed upon a view of the Irish Acts, and they point to conspiracy to murder.

The second point is that there must be some definite person to whom the encouragement, solicitation, or proposal to murder must be addressed, and it is not sufficient if it be to the public generally and no one in particular. In *Reg. v. Fox* (19 Weekly Reporter, 109), before the Court for Crown Cases Reserved in Ireland, it was decided that the prisoner, who wrote and posted a letter to H., in which he requested H. to murder K., the letter having fallen by accident into the hands of a third person, who gave it to a magistrate, and, never having reached H., could not be convicted of soliciting or endeavouring to persuade H. to murder K. It is essential that the act done should be to influence the mind of some particular person. [WATKINS WILLIAMS, J.—In this case the newspaper did reach the persons intended by the writer to be operated upon. LORD COLERIDGE, C.J.—In *Gerhard v. Bates* (2 El. & Bl. 476) it was held that a person induced to take shares in a company by fraudulent statements in a prospectus advertised in a newspaper, and not addressed to him personally, might maintain an action against a promoter and managing director who authorised the advertisement.]

The *Attorney-General* (*Poland* and *A. L. Smith* with him) for the prosecution. The doubt entertained by the Lord Chief Justice at the trial is virtually solved by the finding of the jury, and the only question left is whether, under the statute, the incitement to murder must be addressed to some specific person or persons. The argument that a general incitement is not within the Act is untenable. It is not the less an incitement because it is general and addressed to anyone who might hear it and be open to incitement. Sect. 4 of the 24 & 25 Vict. c. 100, is only a declaration of the common law, and does not create any new offence; and it is so regarded in 1 Russell on Crimes, 906-7. If the defendant had spoken these words to A.B. and others in a crowd instead of writing them in a newspaper, what difference would there have been, and could it be said that he had not spoken the words to A.B. personally? [He was then stopped by the Court.]

LORD COLERIDGE, C.J.—I am of opinion that this conviction should be affirmed. The question arises upon sect. 4 of 24 & 25 Vict. c. 100, which enacts that “all persons who shall, &c., and whosoever shall”—I leave out the unnecessary words—“encourage, or who shall endeavour to persuade any person to murder any other person, whether a subject of the Queen’s, or within the Queen’s dominions, or not, shall be guilty of a misdemeanour.” Now the doubt that arose in my mind was whether the words of this section were satisfied by publication broadcast, of that which, if directed *ore tenus* to a particular individual, or *ore tenus* to a great number of individuals, or by writing to a particular individual or a great number of individuals, would undoubtedly have been within the words of the section. On consideration, I think that doubt was not well founded; indeed, all doubt has been entirely cleared away by the argument which I have heard this morning. I do not think it necessary to pursue the inquiry,

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1881.  
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*Inciting to  
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Newspaper  
article.*

however interesting it may be, as to the history of this clause. It is said that the words are copied from the Irish statutes of 1796 and 1798 (36 Geo. 3, c. 27; 38 Geo. 3, c. 57). It may be that they are, but as has been truly observed, we have not to do with the history of the words, unless the words in the statute are doubtful, and require historical investigation to explain them. If the words are really and fairly doubtful, then, according to well-known legal principles, and principles of common sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statutes creates. But upon looking at these words I think there is no such doubt created by the phraseology. We have to deal here with a publication proved by the evidence at the trial to have been written by the defendant, to have been printed by the defendant, that is, he ordered and paid for the printing of it, sold by the defendant, called by the defendant his article, and intended, as the jury have found, and most reasonably found, to be read by the twelve hundred or more persons who were the subscribers to, or the purchasers of the *Freiheit* newspaper; and further we have to deal with an article which the jury have found, and I am of opinion have rightly found, to be naturally and reasonably intended to incite and encourage, and persuade or to endeavour to persuade persons who should read that article to the murder either of the Emperor Alexander or the Emperor William, or in the alternative the crowned and uncrowned heads of States, as it is expressed in one part of the article, from Constantinople to Washington. The question, therefore, simply is on those facts, which are undisputed, and with regard to which the jury have pronounced their opinion—Do those facts bring it within these words? I am of opinion they clearly do. An endeavour to persuade or an encouragement is none the less an endeavour to persuade or an encouragement, because the person who so encourages or endeavours to persuade does not, in the particular act of encouragement or persuasion, personally address the one or more persons whom the address which contains the encouragement or the endeavour to persuade reaches. The argument has been well put that an orator who makes a speech to two thousand people does not address it to any one individual amongst those two thousand; it is addressed to the whole number. It is endeavouring to persuade the whole number or large portions of that number, and if a particular individual amongst that number addressed by the orator is persuaded, or listens to it and is encouraged, it is plain that the words of this statute are complied with; because according to well-known principles of law, the person who addresses those words to a number of persons, must be taken to address them to the persons who he knows hear them, who he knows will understand them in a particular way, do understand them in that particular way, and do act upon them. For that purpose the case which was suggested by my brother Williams, and was mentioned by me to Mr. Sullivan just now—



the case of *Gerhard v. Bates* (2 E. & B. 476 ; 22 L. J. 364, Q. B.)—is an authority. There are authorities to be found elsewhere to the same effect, that a circular addressed to the public, containing false statements, reaching one of them as one of the public, not as an individual picked out, but as one of the public, who is influenced by the statements in that circular to his disadvantage, and who is injured by them, may afford good ground for a personal action for damages occasioned by the statements in that circular against the person who has issued it to the public, the reason being that the recipient of the circular is one amongst the number of persons to whom it is issued, and he has been injured by the statements contained in it. It seems to me that this is not the less an endeavour to persuade or an encouragement to murder, either named individuals or unnamed individuals because it is under another aspect of the law a seditious and scandalous libel. On the whole, I am clearly of opinion, on the words of the statute and upon the authorities—the only authorities which have been cited appeared to me to be against Mr. Sullivan—that the direction given at the trial is correct, and the conviction right, and proper to be affirmed.

GROVE, J.—I am of the same opinion. The words of the Act, so far as they are material to this case are, “Whosoever shall solicit, encourage, persuade, or endeavour to persuade or shall propose to any person, to murder any other person whether he be a subject of Her Majesty or not, and whether he be within the Queen’s dominions or not, shall be guilty of a misdemeanour,” &c. Now, I think there can be no doubt that those words taken alone, for reasons which I will presently give, apply, at all events, to more than one particular person. I do not think it would be argued that if a person instead of encouraging or endeavouring to persuade one person, endeavoured to persuade two persons, or three persons that that would not be within the Act ; because in endeavouring to persuade two or three persons, he endeavours to persuade each of those two or three persons. Then, to go a step further, supposing he addresses eight or ten persons, and says : “Now I recommend any one of you who has the courage to do it, to murder so and so, and you will gain so and so by it,” or uses other words either by way of argument or by way of promise to induce some one or more of those persons to murder another, surely that would be encouraging a person or persons—that is, each and every one of those persons to murder. Then, supposing it is not done by word of mouth—supposing a person writes a letter—to an individual person to murder the Emperor of Russia, can it be said that that is not wholly within the words of this section ? It appears to me it is absolutely within them. It is a direct encouragement to a person to murder the Emperor of Russia. Then, if he goes further, and, instead of writing one letter, he writes ten or twenty letters, and distributes them to persons whom he thinks they may have an effect upon, or the first twenty who come, does not he then

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encourage each of those persons to commit a murder. Then, to go a step further, if he prints a circular of the same character as a letter, and hands that to twenty or more than twenty persons, is not that an encouragement to every one of those twenty persons to commit a murder? Does he lessen the offence by increasing the number of persons to whom he publishes or transmits this encouragement? Then, can it be said that the printing of a paper and circulating it to a definite body of subscribers, as was done here, or to all the world, is not an encouraging within the section? It is beyond my comprehension to see that that can alter the matter at all. It seems to me, first, that it is clearly within the words of the statute; and, secondly, that so far from extenuating—I do not mean in the sense of punishment, but diluting the offence—it increases it, because he not only endeavours to persuade a person to commit the offence, but a considerable number of different persons, into whose hands the paper may fall. It appears to me, therefore, that it is literally and clearly within the words of the statute, which are “persuade any person,” and it does not the less do that because it persuades, or endeavours to persuade or encourages, separately, a considerable number of persons. Then, there is another argument of Mr. Sullivan’s, which is, as I understand it, that this section is to some extent the same—the words are almost the same—as the previous Irish Act of 38 Geo. 3, c. 57, which was an addition to or an amendment of a previous Irish Act (36 Geo. 3, c. 27), relating to conspiracies. There is no doubt that the Act of 38 Geo. 3 does primarily, by the preamble, appear to relate to conspiracies, because, after reciting the previous Irish Act of 36 Geo. 3, c. 27, whereby it was enacted that persons who should by course of law be convicted of conspiring, confederating, or agreeing to murder a person should be adjudged felons, it goes on to a second recital: “And whereas the said recited Act hath been found ineffectual for the punishment of the crimes of proposing to, soliciting, and persuading others to enter into and engage in such conspiracies, be it therefore enacted that any person or persons who shall propose to, solicit, encourage, persuade, or endeavour to encourage or persuade any person or persons to murder any person, and shall be thereof by due course of law convicted,” &c. Now, there the word “conspiracy” does not occur, although it occurs in the preamble. Then Mr. Sullivan’s argument, as I understand it, is that we are not to hold that the statute 24 & 25 Vict. c. 100, s. 4, applies, unless there is a conspiracy, that is, unless there are two minds brought to bear on the subject. But the statute does not so state. The ineffectual character of the previous statute is recited, and, in order to remedy its defects, the statute of which I am speaking is expressed to be enacted. But I do not require in truth to inquire into the meaning of the Irish statute, because the words of the statute on which this conviction went are perfectly clear. There is no such recital therein as the second

recital in the Irish statute I have alluded to; but sect. 4 of 24 & 25 Vict. c. 100, after having dealt with the question of a conspiracy clearly in the first clause of it, goes on, "and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanour." There the Act severs and contradistinguishes, if I may say so, the two offences—the conspiring on the one hand, and the encouraging or endeavouring to persuade on the other. The law has said, no doubt, that in construing an Act of Parliament where the words are ambiguous and point to a remedy which a previous statute has pointed to, you may look to the previous statute to see the meaning, and to see what the object sought is, and to fairly construe it; but here not only is there no ambiguity, but, to my mind, we are clearly told what the statute intends. Then, as to the evidence, there is ample evidence here not only of circulation to a number of persons, each of whom might be affected, but there is evidence that one person was actually proved to have received the publication, and he might fairly be said to be "a person" just as much as if a letter containing the article had been handed him for his perusal. I do not think proof of such receipt by a particular person necessary, but, if it be necessary, there is evidence of it. Therefore there was ample evidence to support the conviction, the direction was sufficient, and there is nothing here to enable me to say that the conviction should be quashed.

DENMAN, J.—It was fairly and candidly admitted by Mr. Sullivan in the course of his able argument that the sole question in this case is whether there was, upon the facts which are here stated, evidence to go to the jury that the defendant was brought within sect. 4 of 24 & 25 Vict. c. 100. And upon this point it was said for the defendant that it was not made out that he had encouraged or endeavoured to persuade any person to murder any other person. With regard to murdering any other person, that point was not reserved. I think there was nothing to reserve about it, because I should draw the same conclusion which the jury did from the document itself, that it did contain an encouragement or an endeavour to persuade to murder the particular persons whose names are mentioned in it. But it is out of the case, and the only question is whether the words "any person" are met by the evidence in this case. Now, I must own that if that question had been for the first time raised before me, as it was before my Lord upon the trial, my impression is strong, looking at the importance of the case, and looking at the fact of the absence of any authority upon it in our Courts or bearing upon it in our Courts, I should, as my Lord did, have thought it a proper case to reserve for the consideration of the Court of Criminal Appeal, and I am glad he did so; but the question having been reserved, we have to consider whether there was

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here evidence to meet that part of the case. I think there was. The contention was that the statute did not intend to meet such a case, that the statute did not intend to meet the case of a libel of this character, circulated, as libels are circulated, simply by the publication of a paper, and sending it to the subscribers, or allowing it to be circulated amongst the population. I agree with my Lord entirely, and I am glad that he now feels that there is no doubt about it, and that though this may be a mere publication of a libel, still if it is the publication of a libel, and the libel does in itself amount to an endeavour to persuade all persons to whom it is sent to commit a murder, nevertheless it is doing an act intended to be legislated against by this clause, making it a misdemeanour of another character—a misdemeanour punishable by a more severe punishment than the circulation of a libel of an ordinary character would be. The statute was passed for the very purpose, I think, of rendering it a more serious offence than the common law rendered it to do such an act as this. Now I need say no more than that I entirely agree with my Lord and my brother Grove on that point, but I do wish to add this. The doubt which I should have felt probably, if it had come before me, was a doubt in accordance with Mr. Sullivan's argument whether the words "any person" might not mean some definite person; whether some definite person might not have been required to be proved. I should, however, have thought that if it had been made out that the libel had been circulated to a certain set of persons whose identity was easily ascertained, except only that their names were unknown, that then, *quacunque viâ*, the clause would have been fulfilled, even though Mr. Sullivan's contention were a good contention. I do not think it is a good contention; I think the circulation to the world, to multitudes of persons wholly undefined and to whom it would come, would be sufficient; but what I wish to add is this, that even if the other construction were the true one, I think it is important to observe in this case, and I should have been prepared to support the conviction on this ground—that many of these persons were, in that sense, definite persons. They were known subscribers in large numbers to this newspaper, and the man who edited the newspaper, the man who wrote the article, the man who sold the newspaper and caused it to be distributed, did know that that newspaper would, in the ordinary course, come to its regular subscribers at all events, whether it went to a larger number of persons, or whether it did not. Therefore, supposing it were necessary that the persons unknown should be in this case definite persons, ascertainable persons, persons who might be ascertained by inquiry, although unknown to the jurors at the time of their finding, I should have thought that in that sense the indictment was supported by the evidence.

HUDDLESTON, B.—The question for our consideration, submitted to us by the Lord Chief Justice, is whether his direction was correct in point of law, and that direction is this—he told

the jury that if they thought that by the publication of the article the defendant did intend to and did encourage, or endeavour to persuade any person to murder any other person, whether the subject of Her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavour to persuade was the natural and reasonable effect of the article, they should find the prisoner guilty. That was the charge of the Lord Chief Justice, and that is what we are to consider—whether it is correct or not. Now I do not entertain the slightest doubt that that was really the only question that could be left to the jury. The evidence was ample to warrant the finding of the jury, and the only thing that could be left to the jury was to say, “Do you think that by the publication of this article the defendant did intend to encourage or endeavour to persuade any person to murder, and is not the necessary and legal consequence, the reasonable effect of the article, to induce any person to do so?” Now that charge is founded directly on the words of the statute, and if you look at the words of the statute, the distinction which Mr. Sullivan has endeavoured to draw with reference to conspiracy really does not arise; because the section of the statute contemplates two classes of cases—it contemplates one class where there is a conspiracy and another class of cases where there is individual action. The first class of cases in the section is that all persons who shall conspire to that effect shall be guilty of a misdemeanour. The second class of cases is the individual, “whosoever” shall do certain acts, and it is remarkable to see the words which the Legislature have used for the purpose of pointing out the act which makes the party liable. The largest words possible have been used; “solicit,” that is defined to be to importune, to entreat, to implore, to ask, to attempt, to try to obtain; “encourage,” which is to animate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident; “persuade,” which is to bring to any particular opinion, to influence by argument or expostulation, to inculcate by argument; “endeavour;” and then, as if there might be some class of cases that would not come within those words, the remarkable words are used “or shall propose to,” that is to say, make merely a bare proposition, an offer for consideration, shall be guilty of a misdemeanour. It is to be a misdemeanour of a highly criminal character to solicit, to encourage, to persuade, or even to propose to any person to murder any other person, whether one of Her Majesty's subjects or not. Now Mr. Sullivan raised the argument which was passing through the Lord Chief Justice's mind, that you must have an immediate connection between the “proposer,” or between the “solicitor” or the “encourager,” and the person who is solicited, encouraged, or proposed to; that it is not sufficient to solicit generally anybody, that you must solicit some person in particular. What was the intention of this Act? The intention was to declare the law and

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Newspaper  
article.*

to protect people abroad from the attempts of regicides of this description, and therefore the largest possible words are used. It shall be criminal—not to persuade an individual, but to persuade “any person,” that is to say, the “public”—crowds who may hear it if it is an oration, or who may read it if an article in a newspaper. I have been furnished from the bar with a case which is certainly not inapplicable to the present one, which is to be found in Peere William’s Reports in the time of Lord Chancellor Parker (*Poole v. Sacheverel*, 1 P. Wms. 675). The question arose in this way. There was a question of a disputed marriage, and the father, who was interested in the marriage, put an advertisement in the newspapers offering a reward of a hundred pounds if any person would come and give evidence of that marriage. It was suggested that the object of that being circulated was to render impure the sources of justice, to bribe some people to give improper evidence, and the party was brought up for contempt before Lord Chancellor Parker, but it was urged on his behalf that nothing had been done in consequence of the advertisement. No witnesses had come; but the Lord Chancellor said, “It does not appear that some person would not come in if this were not discouraged; however, the person moved against has done his part, and if not successful, is still not the less criminal.” The counsel objects that it is not addressed to any particular person. “It is equally criminal when the offer is to any, for to any is to every particular person. The advertisement will come to all persons, to rogues as well as honest men; and it is a strange way of arguing to say that offering a reward to one witness is criminal, but that offering it to more than one is not so. Surely it is more criminal, as it may corrupt more. If you hold an offer out to the public—an invitation to come in and give perjured evidence—that is as much a criminal act as to request an individual to do so.” Just so it is here criminal to publish to the whole world, or declare to the whole world, that the individual rejoices in regicide, and recommends others to follow his example, and trusts that the time is not long distant when once a month kings may fall. This article was an encouragement to the public—a solicitation and encouragement to any person who chooses to adopt it—and comes within the meaning of the Act. I am perfectly satisfied with the conviction, and think it was right.

WILLIAMS, J.—I am of the same opinion. The jury have found the defendant guilty, and upon the narrow question of law which has been reserved for the consideration of this Court, it seems to me the conviction ought not to be interfered with.

*Conviction affirmed.*

Solicitor for the prosecution, *The Solicitor to the Treasury.*

Solicitor for the prisoner, *H. E. Kisbey.*



## Ireland.

## HIGH COURT OF JUSTICE.

## QUEEN'S BENCH DIVISION.

June 27, 28, 29, and 30, 1881.

(Before MAY, C.J., and a Common Jury of the City of Dublin.)

THE QUEEN v. WALTER WHELAN. (a)

*Admission of evidence—Cross-examination as to credit—Former statements made by witness contradicting his evidence—Rebutting case in reply to substantive evidence contradicting witness.*

*In a trial for murder a witness who swore he identified the prisoner as one of the persons who committed the murder, was cross-examined on behalf of the prisoner as to an alleged conversation which he had shortly after the commission of the crime, in which he was alleged to have stated that the prisoner was not the guilty party; the witness denied that he made such a statement, and the prisoner as a substantial part of his defence produced A. and B. who were present at the alleged conversation to contradict the witness. At the close of the prisoner's case the Crown was allowed to go into a rebutting case in order to produce C. and D., who were present at the alleged conversation, to corroborate the statement of the witness and contradict A. and B.*

*A witness who identified the prisoner as one of the persons who committed the murder, had a conversation with E., a police constable, shortly after the commission of the crime; E. who was examined on behalf of the prisoner, stated that the witness stated to him that he could not recognise any of the murderers as they were masked. On cross-examination E. stated that he had made a report to his superior officers of this statement of the witness. The Crown was not allowed to go into a rebutting case to produce E.'s superior officers for the purpose of contradicting him as to the fact of his having made such a report to them.*

THIS was an indictment against the prisoner Walter Whelan for the wilful murder of Charles Boyd, at Shanbough on the 8th day of August, 1880. A true bill was found against the prisoner at the Spring Assizes, 1881, in the County of Kilkenny, but the trial was postponed, and the venue changed to this Division sitting in Dublin by order of the Division. The evidence was that on the day in question, Mr. Thomas Boyd, accompanied

(a) Reported by OWEN R. ROOPE, Esq., Barrister-at-Law.



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by his two sons, Charles and Evans Boyd, and his nephew, Gladwell Boyd, drove on an outside car from his residence to a farm he owned near Shanbough; Thomas and Gladwell Boyd were seated on the left hand of the car, and Charles and Evans Boyd on the right. When they had arrived at a short distance from the farm three persons in disguise, with masks on their faces, jumped from the ditch armed with rifles, with fixed bayonets. One of them came to the side at which Thomas and Gladwell Boyd were sitting and fired a shot at them, the other two men came to the side of the car at which Charles and Evans Boyd were sitting and fired two shots, one of which fatally wounded Charles Boyd. Evans Boyd swore he recognised the prisoner, Walter Whelan, as the man who fired at him. On making their escape from the attacking party, Evans Boyd drove to fetch a doctor, a distance of thirteen miles, and on his return he was met by a car driven by a man named Crean, conveying three persons named Wallace, Byrne, and Strahan.

Evans Boyd was asked on cross-examination on behalf of the prisoner whether when the party on the car stated that the Whelans had been arrested for the murder, he had not replied "that was wrong, those are not the men." Evans Boyd denied having said so, but stated there was some conversation about two families named Whelan, and that he was told the "Whelans of the Church" had been arrested, and he replied "that was wrong, it was the Whelans of the Cross Road;" the Whelans of the Cross Road being the prisoner and his brother. Crean, the driver, and Byrne were examined for the defence, and they contradicted Evans Boyd, stating that he asserted it was not the Whelans who committed the crime, and did not qualify this statement in any way. At the close of the case for the defence

*Murphy*, Q.C., with him *Ryan*, Q.C., *Naish*, Q.C., *Ourtis*, and *Ross*, for the Crown, proposed to examine Wallace and Strahan as to this conversation with Evans Boyd.

MAY, C.J.—In my opinion you should have given this evidence before.

*Murphy*, Q.C.—We could not, nor even after the cross-examination until the prisoner brought forward witnesses for the defence to contradict Evans Boyd.

MAY, C.J.—Evans Boyd was examined first as to this, and said he had no such conversation. He explained what the conversation was. Then the prisoner gave evidence of what he says the conversation was, and you wish now to examine witnesses to prove what you allege the conversation was. I think you can.

*Hemphill*, Q.C., with him *Peter O'Brien*, Q.C., and *Lynch*, for the prisoner. This evidence is not admissible. The way the law originally stood was this, it was supposed by many most eminent judges that if you ask a witness on cross-examination, as I asked Evans Boyd, as to a particular conversation with a third party, you were bound by that answer, and could not contradict him, and that went so far that in the case of *Reg. v. Burke* (8 Cox

C. C. 44), there was a difference in the Court for Crown Cases Reserved, as to whether evidence could be given to show that a witness was speaking falsely when he swore that he could not speak English, but only Irish. The presiding judge at the trial allowed evidence to show that the witness was swearing falsely, and could speak English. The Court held, by seven to three, that such evidence could not be admitted. When the Common Law Procedure Act was passed, it got rid of questions like this, the 26th section of that Act pointed out the cases in which it could be done, for the general rule of the old common law was that you were bound by the cross-examination.

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MAY, C.J.—When you cross-examined as to credit?

Hemphill, Q.C.—Yes. The 26th section is as follows: "If a witness upon cross-examination, as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it, but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement." Under that section, and having cross-examined Evans Boyd, as to the conversation which took place on the road, I was at liberty to contradict him, by producing the car driver and this witness Byrne, but then he having answered the question, the Crown cannot go into a collateral inquiry as to whether he is to be believed or whether my witness is to be believed. The jury must act on the evidence as it is. If it was admissible at all, it should have been made part of the original case of the Crown, for I drew the attention of Evans Boyd, as I was bound to do, to what occurred on the road. But in the next place it would involve a collateral inquiry, quite beside the question in the case, and would lead to all those results to avoid which the rule was laid down, that you could not go into collateral questions; and if a witness is asked a question on cross-examination the parties are bound by the answer. There is no authority that can be cited where any attempt was made to give such evidence.

MAY, C.J.—Do you mean that on your side you can give evidence to contradict the statement of this witness, and that the Crown cannot give evidence to contradict you?

Hemphill, Q.C.—That is our contention.

MAY, C.J.—I do not agree with that; besides, there is a discretion in every judge to allow either side to give evidence as to any point which is material.

Murphy, Q.C.—In the first place it lies in the discretion of the court to allow evidence on any material point. But besides, when Evans Boyd was cross-examined as to this point they had a perfect right to examine witnesses to contradict him, but when he went down it would not be legal evidence for me to make a substantive case grounded on his examination; but when the

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prisoner makes it a substantive part of his own case, not as a collateral matter but a relative matter, then I am at liberty to go into this as a rebutting case.

MAY, C.J.—I have no hesitation in letting you do so. But of course you are not to examine the witness as to previous statements.

The witness, Evans Boyd, had been examined as to a conversation with a police constable named Byrne, in which he was alleged to have stated that he did not know who the persons were who attacked the car as they were masked down to the ground. Evans Boyd denied having made any such statement. Constable Byrne was examined for the prisoner and stated that Evans Boyd had made this statement to him. On cross-examination by the Crown he stated that he had made a report of this conversation with Evans Boyd to Sub-inspectors French and Dunsterville, his superior officers. At the close of the case for the prisoner,

Murphy, Q.C., proposed to examine Sub-inspectors French and Dunsterville with respect to Byrne's statement that he had reported to them his conversation with Evans Boyd.

MAY, C.J. refused to admit this evidence.

*Verdict, Not Guilty.*

## NORTHERN CIRCUIT.

### LIVERPOOL SUMMER ASSIZES.

*Tuesday, Aug. 2, 1881.*

(Before Mr. Justice LOPES.)

REG. v. McGRATH AND McKEVITT. (a)

24 & 25 Vict. c. 97, sect. 9—*Construction—Evidence.*

*On an indictment under sect. 9 of the 24 & 25 Vict. c. 97, for maliciously damaging a building by the explosion of dynamite, whereby the lives of certain persons were endangered:*

*Held, by Lopes, J. (after consulting Lord Coleridge, L.O.J.) that the endangering of life, to be within the section, must result from the damage done to the building particularised in the indictment; but that the enactment does not contemplate the necessity of the persons endangered being inside the building, and would include the case of persons outside whose lives were imperilled by anything proceeding from the damaged building. Held also, that for the purpose of proving such endangering of life, evidence of damage to other buildings that might be inhabited was not admissible; though such evidence would be admissible*

(a) Reported by JOHN KINGHORN, Esq., Barrister-at-Law.

*for the purpose of showing the nature and character of the explosion, the extent of the damage, and its tendency to injure or destroy the particular building.*

*To endanger within sect. 9, includes not only actual injury received by a person, but also exposure to risk or chance of injury; but it is for the jury in each case to say, from all the circumstances, whether or not the lives of persons were imperilled.*

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**T**HIS was the second of three indictments that had been found by the grand jury against two men named James McGrath and James McKevitt, for attempting to blow up the Town Hall, Liverpool, by means of dynamite, on the 10th day of June, 1881.

The first indictment, which charged them with having done this with intent to murder, and the third indictment founded on the damage caused to other buildings in the vicinity of the Town Hall, by the force of the explosion, were abandoned; and the second indictment was alone proceeded with.

The second indictment was framed under sect. 9 of the 24 & 25 Vict. c. 97, which provides that whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house or of any building, whereby the life of any person shall be endangered, shall be guilty of felony, and sect. 10, which makes it felony to place any explosive substance against or near any building with intent to destroy or damage any building, whether or not any explosion take place, and whether or not any damage be caused.

The 1st count of the indictment alleged that the prisoners on the 10th day of June, 1881, did, by the explosion of dynamite, damage the Town Hall in Liverpool, whereby the life of Samuel Page was endangered.

The 2nd and 3rd counts respectively described the substance used as nitroglycerine, and as a substance unknown.

The 4th, 5th, and 6th counts were similar to the first three, except that they alleged that the life of Mathew Swarbrick was endangered.

The 7th, 8th, and 9th counts were to the same effect, but alleging that the life of Edward Creighton was endangered.

The 10th, 11th, and 12th counts were also similar, but alleging that the life of George McBurney was endangered.

The 13th count alleged that the prisoners did place near a certain building called the Town Hall, in Liverpool, a quantity of dynamite, to wit 2lb., with intent to damage the said building.

The 14th and 15th counts variously described the substance used as nitroglycerine and a substance unknown.

*Aspinall*, Q.C., and *R. S. Wright*, were counsel for the prosecution, and

*Dr. O'Feeley* for the prisoners.

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The identity of the prisoners with the persons who did what was done, and the main facts of the case were not at the last disputed, and the only question was as to the intent.

About four o'clock in the morning of the 10th day of June, 1881, two men were seen to place a bag, similar to a sailor's bag, on the top step of the side entrance to the Town Hall, and a constable, noticing smoke issuing from the bag, rushed at the men, who ran away. Another constable threw the bag on to the pavement, while a third threw it into the middle of the street, and was about to cut the string by which the bag was tied, when, hearing a fizzing noise, he drew back. Immediately afterwards two explosions followed, and a quantity of glass fell from the Town Hall, and from some buildings opposite, called "Phoenix Buildings," and a cornice near the roof of some other buildings, called "Brown's Buildings," was also damaged.

In the street where the explosion had taken place were found several pieces of iron piping, some plugs, caps, a piece of carpet, a piece of an old dress, and some rags. In the piping was found a red substance, which, on analysis, was sworn to be one of the nitro compounds of nitro-glycerine, the most common of which is dynamite, while the caps were filled with fulminating mercury.

At the time of the explosion, the only occupants of the Town Hall were two watchmen, who afterwards found some pieces of iron and iron piping that had come through the windows into the lavatory and the ante-room of the Mayor's parlour, and a piece of iron railing was found lying in the area. The actual damage done to the Town Hall was thus described by one of the witnesses :

Fletcher Thomas Turton, architect and surveyor, and deputy-surveyor of the Corporation of Liverpool, said : "I examined the Town Hall on the morning of the 10th day of June. In the Mayor's parlour one square of glass was broken. In the ante-room seven squares of glass were broken, the blind was slightly damaged, and there was a small indent in the wall four feet from the window on the outside. The depth of the indent was about a quarter of an inch. It appeared to have been caused by some hard substance striking it. In the Mayor's lavatory, six squares of glass were broken, and there were slight marks on the wall and ceiling, the marks on the ceiling being about twelve feet from the outside of the building. It was probably done by pieces of iron. In the lavatory the mark on the ceiling was a quarter of an inch deep. In the entrance, six squares of glass were broken in the fanlight; and in the lavatory north of the entrance nine squares of glass were broken, and one in the ventilator. In the Council-chamber, and the staircase adjoining, one square of glass was broken in each; and nine squares of glass were broken in the windows here, and seven squares in the dining-room on the first floor. Outside the building, on the west side, there were marks in nine or ten places, in some instances deep ones. One angle knocked off was two or three inches deep. The woodwork of the west door was slightly damaged, and the head of one of the railings was broken.

The witness was about to give evidence as to the damage done to the Phoenix Chambers on the opposite side of the street, when

*O'Feeley*, for the prisoners, objected to the admissibility of the evidence of damage done to an independent building, as the only damage alleged in the indictment was damage done to the Town Hall.

*Aspinall*, Q.C., for the prosecution, urged its admissibility, as



showing the general character of the prisoners' act. So far as they were concerned, the fragments of the missiles might fly in any direction, and, if thereby damage was done to another building, it would be competent for the prosecution to give evidence of it. Sect. 10 provided that, if any person shall destroy, throw down, or damage any dwelling-house, any person being therein, or any building so that the life of any person may be endangered, shall be guilty of felony. But, in the case of any building—whether a dwelling-house or not—if the life of any person was endangered by the act, then it was sufficient. For the purposes of that part of the section, it was utterly immaterial whether any person was in the house, or not. As to the words, "damage any building, whereby the life of any person shall be endangered," that meant that, if the prisoners, by means of gunpowder, or any other explosive substance, destroy, or damage, the whole, or any part, of any building, then, if, at the same time, by the same act, they endanger the lives of any persons, they have completed the offence.

LOPES, J.—I do not go quite so far with you.

Aspinall.—Explosion is the governing word; otherwise the statute must be construed as if it meant that the persons must be injured by the falling building, or by the bricks and stones falling from the damaged building. Then if the danger was not directly traceable to the damage to the building it would not apply, and it would follow that if a man was killed by a missile going through an open window, no offence would have been committed, as the building was not damaged, though clearly his life would have been endangered by the act.

O'Feeley submitted that the true construction of the section was that the person endangered must be directly in communication with the building.

LOPES, J.—There I am against you; the only question is whether the word "whereby" refers to the damage or to the explosion.

O'Feeley.—I submit that "damage" is the governing word, and that the word "whereby" refers to the last substantive immediately preceding it, as being the fairest construction.

Aspinall contended that "whereby" referred to the whole act.

LOPES, J., said he did not think the act contemplated the necessity of persons being inside the damaged building, but would include the case of policemen whose lives were imperilled outside the building if any injury that occurred to them proceeded from the damaged building. Whether this construction could be extended to other buildings was a very important point as affecting the prisoners. This, he continued, is a matter of such extreme importance that I shall see the Lord Chief Justice (Lord Coleridge) and ascertain his view of the point. [Lopes, J. then retired to consult Lord Coleridge, C.J., and on returning into court he said:] I have taken the opportunity of consulting

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the Lord Chief Justice on this point, and the view he takes is like my own, and he thinks my view is the correct one; he cannot possibly read the section in any other way. I thought of this before the point arose, and I feel very strongly upon it. I was of opinion this morning that the evidence affecting other buildings that might be inhabited, and which might therefore greatly affect the indictment, was not admissible.

*Aspinall.*—This then confines the question for the jury to whether the lives of the two men who were in the Town Hall were endangered. But I apprehend it does not touch the point whether this evidence as to the other buildings is admissible merely for the purpose of showing the violence and nature of the explosion, and that it was calculated to do damage to the Town Hall.

*O'Feeley* contended that such evidence was not admissible: the danger to life must proceed from the damage actually done to the building, and not from the possibility of damage. It must proceed from the damage done to the building named in the indictment, and these other buildings were not so mentioned; and it did not matter how violent the explosion was, that which did not result in damage was not within the meaning of the Act of Parliament.

*LOPES, J.*—Evidence of this kind might be given to show that pieces of iron were found 300 yards away from the place, and the value of this evidence would be to show that the explosion was a violent one, and calculated to do damage. [After some further discussion, he added:] My decision only comes to this: Any peril in which the policemen outside were put in consequence of the damage to the building will not, but if any persons inside that building were put in danger, then I think it comes within the terms of the Act of Parliament. You see damage is done by the breaking of the window, and that is one of the matters about which I consulted the Lord Chief Justice this morning, and he did not quite think it would do.

*LOPES, J.* in the course of his summing up to the jury, observed, in reference to the question whether the damage caused by the explosion put in peril the lives of any person in the building, that it was not necessary for the purposes of the indictment that those persons should have received any actual injury, but that it was for the jury, from the whole circumstances attending the act done to draw their own conclusion as to whether any peril existed.

The prisoners were found guilty of damaging the Town Hall by an explosion whereby the lives of certain persons were endangered. McGrath, who was also found guilty as accessory before the fact to an attempt to blow up the Police Section House, was sentenced to penal servitude for life; McKevitt to fifteen years penal servitude.

Solicitor for the Treasury, *Marks*, Municipal Offices, Liverpool.  
Solicitor for the prisoners, *Quelch*, Liverpool.

## CROWN CASES RESERVED.

*Saturday, July 2, 1881.*

(Before Lord COLERIDGE, C.J., GROVE, and DENMAN, JJ.,  
HUDDLESTON, B., and WATKIN WILLIAMS, J.)

REG. v. TONKINSON. (a)

*Larceny by bailee—Deed entrusted to a professional person for the purpose of transfer of mortgage.*

*The prosecutor advanced money to the prisoner, a solicitor's clerk, upon the deposit of a deed conveying the equity of redemption to the prisoner in a house of his own, and, subsequently, he obtained a legal mortgage from him as security for the sums so advanced. The prisoner then obtained from the prosecutor the deed conveying the equity of redemption on the representation that he had found a person who would take a transfer of the mortgage. The prisoner then obtained 140l. from another person on the deposit of that deed with him without notice of the prosecutor's mortgage, and appropriated the money to his own use. The judge at the trial directed the jury that the prisoner was a bailee of the deed, and the jury found that he had fraudulently converted it to his own use.*

*Held, that the direction was right, and that the prisoner was properly convicted of larceny as a bailee.*

CASE stated by the Recorder of Newcastle-under-Lyme.

At the Sessions held before me at Newcastle-under-Lyme, on the 1st day of April, 1881, William Tonkinson (herein called the prisoner) was indicted for larceny as a bailee.

The first count alleged that he, being the bailee of a valuable security, the property of George Ward (herein called the prosecutor), to wit, an indenture dated, &c., whereby the equity of redemption of and in certain premises was assured to the use of the prisoner, did feloniously steal, take, and carry away and convert the same to his own use against the form of the statute, &c.

The second count charged that the said prisoner afterwards and within six months from the time of the committing of the said offence in the said first count charged, to wit, on, &c., feloniously and fraudulently did steal, take, and carry away and convert to his own use a certain valuable security, to wit, a certain deed of conveyance of freehold property, situate in the parish of Stoke-upon-Trent, he, the said prisoner, being the bailee thereof, the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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said valuable security then being the property of the said prosecutor against the form of the statute, &c.

The third count charged that the said prisoner afterwards, and within the space of six months, &c., did feloniously and fraudulently steal, take, and carry away 100*l.* of the moneys of the said prosecutor against the form of the statute, &c.

It was proved that the prosecutor was in the habit of employing, professionally, the prisoner, who was clerk to a solicitor.

That, previous to the 1st day of January, 1880, he had a conversation with the prisoner about the equity of redemption of and in a house at Stoke-upon-Trent, the deed conveying it being the property of the prisoner, and that on its being deposited with the prosecutor as a security, he advanced to the prisoner, at different times, several sums of money.

That, on the 1st day of January, 1880, the prisoner executed a deed whereby, in consideration of 100*l.*, being the whole sum advanced to him, the said premises were mortgaged by the prisoner to the prosecutor.

The prosecutor kept the two deeds till the end of February or the beginning of March, when the prisoner told him that he had found a person who would take a transfer of the mortgage on the premises at Stoke, and asked him to let him have the deed for the purpose of obtaining the money.

In consequence of such representation the prosecutor delivered to the prisoner the deed conveying the equity of redemption, retaining himself the mortgage deed.

Up to the month of June the prosecutor frequently asked the prisoner for the transfer, and the prisoner made various excuses, such as that "he was much occupied," and that "things could not be done in a hurry," &c., and the prosecutor, placing trust and confidence in him, forbore to press him.

About the 28th of June the prosecutor was at the office of Griffiths (who was the employer of the prisoner), and met Mr. Onions, another solicitor, and a conversation took place, in the course of which the name of the prisoner was mentioned.

On the same evening the prosecutor saw the prisoner, and told him that he had seen Onions, and that he believed that his deed (equity of redemption) was deposited with him, and that he (the prisoner) had obtained some money for him upon it.

This was denied by the prisoner, who said that he had a person who would buy the premises at Stoke and give a good price for them, and that if the prosecutor would wait he would get his money, and that he need not make himself uneasy about it.

It subsequently transpired that in February or March the prisoner had applied to Onions for a loan, and proposed to give as security the equity of redemption on premises at Stoke-upon-Trent, and that on or about the 6th of March the sum of 140*l.* was advanced by Onions to the prisoner, and the prosecutor's deed, conveying the equity of redemption, was deposited with Onions, he believing that the deed was the property of the

prisoner, and having never heard of the prosecutor till the end of June.

Under these circumstances it was contended by the prisoner's counsel that he could not be convicted upon either the first or second count of the indictment, as a bailee of the deed conveying the equity of redemption, inasmuch as he was under no obligation to return the deed itself, having the option either to return the deed or to pay the prosecutor the money obtained upon it.

I told the jury that in my opinion the prisoner was a bailee of the deed, and that the question for their consideration was whether he had fraudulently converted it to his own use.

They returned a verdict of guilty, but the prisoner's counsel, being dissatisfied with my direction to the jury as incorrect in point of law, requested me to state a case for the opinion of the Court for Crown Cases Reserved.

I therefore state the case as requested, and I submit the same very respectfully for the consideration of this Honourable Court.

If they should be of opinion that my direction to the jury was incorrect in point of law, the prisoner (who was admitted to bail) is to be discharged.

If, on the contrary, they should be of opinion that my direction was correct, then the prisoner is to appear at the next Sessions to receive judgment.

(Signed) T. C. SNEYD KYNNEERSLEY.

No counsel appeared to argue on either side.

The Judges retired to consider their judgment.

LORD COLERIDGE, C.J.—We are of opinion that the conviction should be affirmed. The case is not very clearly stated, and we have had some difficulty in ascertaining the facts upon which the direction of the learned recorder to the jury proceeded. As I understand the facts, they are these: The prisoner was possessed of a house of his own, situate at Stoke-upon-Trent, upon which there was a mortgage in respect of which the prisoner was entitled to the equity of redemption, and, upon the deposit of the deed conveying that to him, the prisoner had obtained at different times from the prosecutor several sums of money up to the 1st day of January, 1880. On that day the prosecutor, apparently not content with the bare deposit of the deed, took from the prisoner a legal mortgage for the sum of 100*l.*, that sum including all the sums advanced by the prosecutor to the prisoner up to that time. It is stated in the case that the prosecutor had both the deeds; that is, the one relating to the equity of redemption and a regular second mortgage deed on the property at Stoke-upon-Trent. The original deed, which was prior to the 1st day of January, 1880, and that of the 1st day of January, 1880, were both in the custody of the prosecutor, and they so remained for about six or eight weeks. Then, somewhere about March, the prisoner told the prosecutor that he knew somebody who would pay off the 100*l.*, and take a transfer of his mortgage

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on the premises at Stoke, and for the purpose of obtaining this sum of 100*l.*, he got from the prosecutor the deed conveying to him the equity of redemption, which was manifestly part of the prosecutor's title to the property. It was a valuable deed, and gave the prosecutor a charge on the equity of redemption, which was the subject matter of the mortgage of the 1st day of January, 1880. It turned out that the prisoner, having got the deed, obtained from a solicitor 140*l.* upon the deposit of that deed with him, the solicitor having satisfied himself that the house would bear such an advance upon it. Then the prosecutor got uneasy, he having parted with the deed to the prisoner solely that he might get an advance upon it out of which the prisoner should repay him the 100*l.*, and asked the prisoner for the deed repeatedly up to the month of June. The prisoner put the prosecutor off with various excuses from time to time, but eventually it turned out what had become of it. Then the prosecutor, finding that his security for his advance of 100*l.* was greatly damaged, and not having been paid his 100*l.*, commenced criminal proceedings against the prisoner. Upon these facts, it is clear that when the deed was given by the prosecutor to the prisoner, either that deed was to be handed back to him, or the 100*l.* to be repaid out of the money to be obtained by the prisoner upon it; but neither of these things was done. The prisoner was indicted for fraudulently converting to his own use a valuable security of which he was the bailee, and the learned Recorder directed the jury that, in his opinion, the prisoner was a bailee of the deed, and that the question for their consideration was, whether the prisoner had fraudulently converted it to his own use, and the jury found that he had fraudulently converted the deed to his own use. Now, I am of opinion that the direction to the jury was right. The prisoner, under these circumstances, was undoubtedly a bailee of the deed. Cases have been brought to my attention in which it was held that, where the identical thing entrusted to a person was not to be returned, but something else the produce or equivalent of it, the person could not be indicted under the statute as a fraudulent bailee for appropriating the thing to his own use. Whether those cases would now be held to be law we need not inquire, for the present case does not trench on any of them. In this case the prisoner was entrusted with the deed for the purpose of raising money on it, out of which the prosecutor was to be repaid, and undoubtedly the prisoner was bound to return to the prosecutor the very piece of parchment entrusted to him, unless the money advanced upon it by the prosecutor was repaid. The prosecutor neither got back the deed nor his money, and he has been defrauded of his deed, and the deed has been deposited with another person for an advance of 140*l.*, and without notice to that person of the prosecutor's charge. The question reserved is, whether the learned Recorder's direction to the jury that the prisoner was a bailee of the deed was right; and I am clearly of

opinion that the prisoner was a bailee of the deed, and that the conviction was right.

GROVE, J.—I agree with my Lord in all that he has said. I think that it was never intended that the deed should be actually dealt with by the prisoner, but only that it should be used by him for the purpose of getting the advance the prisoner spoke about, out of which the prosecutor was to be paid off.

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DENMAN, J.—I am of the same opinion. I presume the deed which was given to the prisoner was the deed which conveyed the equity of redemption to the prosecutor; but our judgment will be equally well founded if it was the second deed. The case of *Reg. v. Hassall* (Leigh & Cave, 58; 8 Cox C. C. 491) does not conflict with the present.

HUDDLESTON, B.—I am of the same opinion. The cases of *Reg. v. Hoare* (1 Fos. & Fin. 647), *Reg. v. Garrett* (2 Fos. & Fin. 14), and *Reg. v. Hassall* (*ubi sup.*), decided that a person could not be convicted of larceny as a bailee unless the bailment was to redeliver the very same chattel or money. But, whether those cases would be supported now is not material to this case, for it is clear that this deed was deposited with the prisoner for the particular purpose of enabling the prisoner to get money out of which he was to pay off the prosecutor's advance. It is like the case of *Reg. v. Aden* (12 Cox C. C. 512), where the prosecutor gave the prisoner money to buy coals for the prosecutor from a colliery, and the prisoner did not buy any coals, but appropriated the money to his own use, and it was held that the prisoner was rightly convicted of larceny as a bailee.

WATKIN WILLIAMS, J. concurred.

*Conviction affirmed.*

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## CROWN CASES RESERVED.

*Saturday, May 21, 1881.*

(Before Lord COLERIDGE, C.J., GROVE, HAWKINS, LOPES, and  
STEPHEN, JJ.)

REG. v. FENNELL. (a)

*Evidence—Confession—Admissibility—Inducement to confess.*  
*Previously to being given in charge, the prisoner was taken into a room where the prosecutor and an inspector of police were. The prosecutor then said to the prisoner, "He (meaning the police inspector) tells me you are making housebreaking implements; if that is so, you had better tell the truth, it may be better for*

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.



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*you."* The prisoner then made admissions which contributed materially to his conviction upon an indictment for larceny. Held, upon the authority of decided cases, that these admissions were inadmissible after the inducement held out in the words "it may be better for you."

CASE reserved for the opinion of this Court by the Chairman of the Second Court, at the Surrey sessions.

William Fennell and Arthur Male were tried before me on Monday, the 11th day of April, 1881, on an indictment which charged them with larceny as servants.

I withdrew the case of Male from the jury for want of sufficient evidence.

Fennell was convicted mainly upon admissions made by him in the presence of the prosecutor and police inspector Chamberlain, before he was charged.

The question upon which the Court are asked to give their opinion is :

Whether the admissions made by the prisoner Fennell were properly received in evidence as against him.

The following are the circumstances under which the admissions were made :—

Previously to being charged, Fennell was taken into a room with the prosecutor and Inspector Chamberlain.

The prosecutor then said to Fennell, "He (meaning Chamberlain) tells me you are making housebreaking implements ; if that is so, you had better tell the truth, it may be better for you."

Fennell then made admissions which contributed materially to his conviction.

The point was then raised by Fennell's counsel as to whether these admissions of Fennell could, after what the prosecutor had said to him, be received in evidence.

I decided that they might be received, on the ground that the words addressed to Fennell by the prosecutor did not "import a threat of evil or a promise of good," and so render his statement inadmissible.

If the Court should be of opinion that the admissions of Fennell were receivable, the conviction is to be affirmed ; if on the other hand, the Court should be of opinion that they ought not to have been received, the conviction is to be quashed.

GEORGE SOMES,

Chairman of the Second Court, Surrey Sessions.

*Mews* for the prisoner.—The principle upon which confessions in criminal cases are receivable in evidence is that they must be shown to have been made voluntarily (2 Hawk. P. C. c. 46, ss. 37 *et seq.* ; 1 Taylor on Ev. c. 15, s. 872, ed. 1878) ; and no confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement, threat, or promise proceeding from a person in authority, and having reference to the charge against the accused person. Stephen's Dig. of the

Law of Evid. art. 22. The learned counsel then cited *Reg. v. Baldrey* (2 Den. C. C. 430; 5 Cox C. C. 523); *Reg. v. Garner* (1 Den. C. C. 329; 3 Cox C. C. 175). In *Reg. v. Garner* the words used by the prosecution were, "It would be better for her to tell the truth;" and Maule, J. said, "There can be no doubt that such words, if spoken by a competent person, have been held to exclude a confession over and over again." (*Rex v. Kingston*, 4 Car. & P. 387; *Rex v. Walkley*, 6 Car. & P. 175; *Rex v. Thomas*, 6 Car. & P. 353; *Rex v. Sheppard*, 7 Car. & P. 579; *Reg. v. Jervis*, L. Rep. 1 C. C. R. 97; 10 Cox C. C. 574; *Reg. v. Bate*, 11 Cox C. C. 686; *Reg. v. Doherty*, 13 Cox C. C. 23; *Reg. v. Zeigert*, 10 Cox C. C. 555; *Reg. v. Reeve*, L. Rep. 1 C. C. R. 362; 12 Cox C. C. 179 were also referred to.

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*Prankerd* for the prosecution.—It was a question for the judge at the trial to decide whether the confession of the prisoner was induced by a promise, or a threat, which operated on the mind of the prisoner. In this case the judge held, looking at the surrounding circumstances, that the statement of the prosecutor did not operate on the mind of the prisoner at the time of the confession. On the general rule as to the admissibility of confessions of this kind, 1 Burn's Just. 973, was referred to.

Lord COLERIDGE, C.J.—We are all of opinion that the conviction in this case cannot be sustained. It is well established by the authorities, which all bear in one direction, that this confession was inadmissible after an inducement such as that held out by the prosecutor.

The rest of the Court concurring,

*Conviction quashed.*

Solicitor for the prosecution, *The Clerk of the Peace for the County of Surrey.*

Solicitor for the prisoner, *Fullagar.*

## QUEEN'S BENCH DIVISION.

*Wednesday, March 23, 1881.*

(Before DENMAN, J., and POLLOCK, B.)

*Re MALTBY. (a)*

*Habeas corpus—Insanity—Criminal law—India—Person not tried for any charge or offence because of unsound mind—Removal from India to England—14 & 15 Vict. c. 81, ss. 1, 2—39 & 40 Geo. 3, c. 94, s. 1.*

*M., a European, having caused the death of a person in India, was visited in his bungalow by the district magistrate, who attended there with witnesses intending to investigate the charge.*

(a) Reported by J. A. FOOTE, Esq., Barrister-at-Law.

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*In consequence of the state of mind of M., and the report made thereon to the district magistrate by two medical men, proceedings were stayed under the Indian Criminal Code 1872, and M. was removed to Madras under an order of the Madras Government. The High Court at Madras, on an application to them for the release of M., determined that he was lawfully in custody, and called the attention of the Madras Government to 14 & 15 Vict. c. 81. The Madras Government thereupon ordered his removal to England under sect. 1 of that statute, and on his arrival in England he was, by a warrant of the Home Secretary, confined at first in Broadmoor Criminal Lunatic Asylum, and afterwards in a private lunatic asylum kept by S.*

*Held, on the argument of a rule for a habeas corpus, that M. was a person charged with a crime or offence in India, and not tried on the ground of his being found to be of unsound mind, within 14 & 15 Vict. c. 81, and that his detention and confinement in the asylum of S. were lawful.*

**R**ULE nisi calling on the Secretary of State for the Home Department, and Dr. Stillwell, superintendent of Moorcroft Lunatic Asylum, to show cause why the body of one Thomas James Maltby should not be brought before the court to ascertain the legality of the circumstances under which he was detained and confined.

Thomas James Maltby was confined in Moorcroft Lunatic Asylum under a warrant from the Secretary of State for the Home Department, which was in the following terms :

Victoria R.—Whereas Thomas James Maltby was charged before the district magistrate of Vizagapatam, in the presidency of Madras, British India, with having on or about the 25th day of December, 1879, at Satiroda, in the district of Vizagapatam, caused the death of Latchim Nazada by doing an act with the intention of causing the death of the said Latchim Nazada, and the said T. J. Maltby was found by the said magistrate and by the High Court of Judicature in Madras to be unfit to plead to the said charge by reason of unsoundness of mind.

And whereas the Governor of Madras in Council, by order dated the 20th day of April, 1880, directed, in pursuance of the provisions of an Act of Parliament made and passed in the fourteenth and fifteenth years of our reign, that the said T. J. Maltby should be removed to, and kept in safe custody in England until further order should be made therein in pursuance of the said Act.

And whereas the Rt. Hon. Sir William Vernon Harcourt, one of our principal Secretaries of State, did by warrant under his hand bearing date the 5th day of May, 1880, order and direct that the said T. J. Maltby should be conveyed to and kept in Broadmoor Criminal Lunatic Asylum, in the county of Berks.

And whereas humble suit hath been made unto us to be graciously pleased to order the said T. J. Maltby to be removed from the said Broadmoor Lunatic Asylum to the lunatic asylum in Moorcroft House, Hillingdon, in the county of Middlesex.

We, taking the premises into our Royal consideration, do, by virtue of the before-mentioned Act, hereby signify our pleasure that you do receive the said T. J. Maltby from the said Broadmoor Asylum, and keep him in safe custody in the said lunatic asylum at Hillingdon, there to remain until our further pleasure shall be known.

And for so doing this shall be your warrant.

Given, &c., the 19th day of July, 1880, by Her Majesty's command,

(Signed)

W. V. HARCOURT.

To our trusty and well-beloved the Superintendent of the Lunatic Asylum at Moorcroft House, Hillingdon, in the county of Middlesex, and to all others whom it may concern.

The judgment of the High Court of Judicature at Madras, *Re MALTBY.*  
referred to in the above warrant, was as follows :

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Upon reading, &c., and upon hearing, &c. The court delivered the following judgment (March 10, 1880): No rules of procedure having as yet been framed under sect. 148 of the High Courts Code of Criminal Procedure Act, 1875, there is no express provision for the presentation of an application of this nature by the next friend of a lunatic; but such a procedure is consistent with the general practice of the court in India from . . . . and we have felt ourselves justified in entertaining the petition. It is apparent from the documents produced on the part of the Crown that an inquiry was commenced by the magistrate of the district having jurisdiction in a matter in which Mr. Maltby was reported to have committed murder by slaying a man without provocation. The district magistrate, after taking the evidence of two medical men, was satisfied Mr. Maltby was of unsound mind and incapable of making his defence. He, therefore, under sect. 423 of the Code of Criminal Procedure, reported the matter to the Government, under sect. 426 of the Code of Criminal Procedure; and the Government on receiving this report directed that Mr. Maltby should be detained in the lunatic asylum at Madras, which is situate within the ordinary original criminal jurisdiction of this court. The accused was conveyed to the asylum, and arrived there on 10th Jan., and has been there confined up to the present date. On the 21st Feb. under the order of Government, a committee of official visitors examined Mr. Maltby, and pronounced him then insane and incapable of making his defence. We have examined Dr. L., the superintendent of the asylum, and Dr. P. one of the committee of visitors. In our judgment Mr. Maltby is still suffering from mental disease, and his mind is affected, specially with regard to the matter which occurred on the 24th Dec. By reason of the delusions under which he labours, to use the words of the English law, "he cannot plead with that advice and caution that he ought." This being so, it follows that he is now being dealt with according to law. It is competent to the Government to detain him in this country until he recover his reason sufficiently to make his defence, or under 14 & 15 Vict. c. 81, to order him to be removed to any part of the United Kingdom, there to abide the order of Her Imperial Majesty. Having found that Mr. Maltby is being dealt with according to law, we can pass no order interfering with the discretion of the Government. (Signed by the Court.)

*Removal of lunatic charged with an offence in India from India to England—14 & 15 Vict. c. 81.*

March 21.—Sir Henry James, Q.C. (A.G.), Poland, and A. L. Smith showed cause.

J. D. Mayne and Castle supported the rule.

March 23.—DENMAN, J.—This was an application for a writ of *habeas corpus* in which a rule *nisi* had been granted, and has now been argued; and we have to decide whether that rule should be made absolute or should be discharged. It is, no doubt, a case of considerable importance and a good deal of difficulty; but, on the whole, I am of opinion that the rule ought to be discharged. The applicant, Mr. Maltby, is a gentleman who has been in office as an assistant magistrate of a district in India, and when on a journey to Calcutta for his health he was unfortunately under the impression that certain persons were emissaries of some foreign potentate or rebel, and had designs on his life; and it is impossible to doubt that he was the subject of a charge of murdering one of these persons whom he so supposed to be hostile to him, by firing at them. That being the state of things, a gentleman named Irvine, a magistrate of the district, admittedly acting with every desire to be fair and candid, proceeded to the place where he was at the time, Mr. Maltby then being in such a condition that it was necessary that he should be kept apart from other persons, or at any rate carefully watched. It appears from the papers that Mr. Irvine went there ready to take the charge, and that the witnesses were ready to be examined, but

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that the behaviour of Mr. Maltby was so violent that it was impossible at that time to go into any judicial inquiry without still further exciting him. In consequence of that, the witnesses being all present for the purpose of being examined, and Mr. Irvine having gone to the bungalow in which he was, in order to inquire as a magistrate whether or not he ought to be sent for trial on the charge of having caused death with intention to do so, Mr. Irvine came to the conclusion that he was of unsound mind, and that it was absolutely impossible to hold such an inquiry. Having come to that conclusion he caused Mr. Maltby to be examined by certain medical gentlemen, who reported that Mr. Maltby was not fit to take his trial, and that it was absolutely necessary that he should be removed to Madras for his health and for his safe custody. Whether or not that proceeding was lawful is one of the points which have been argued before us. Under these circumstances he was removed to Madras; and then an application was made by a gentleman purporting to act on his behalf to the High Court at Madras. The court, after hearing the application, decided that he was in lawful custody in India, and pointed out the statute 14 & 15 Vict. c. 81, to the applicability of which in such a case they called the attention of the Government of Madras. The main question in this case is, whether the Government of Madras had authority, acting under that statute, to send Mr. Maltby over to England; and consequently whether he was lawfully sent to England, and is in lawful custody here where he now is, namely, in a private lunatic asylum. That being so, it becomes necessary to go backwards and look at the papers which show the way in which Mr. Maltby comes to be confined where he now is. The last document in point of date is that signed by the Secretary of State, which recites the facts, generally stated, and further recites that he was charged in Madras with causing death with intention, and that he was found by the magistrate, and also by the Court of Madras, to be of unsound mind, and that the Governor of Madras then directed him to be removed to England under the statute to which I have referred (14 & 15 Vict. c. 81), where he was sent by the order of the Secretary of State, first to Broadmoor Criminal Lunatic Asylum, and then to the asylum where he now is. That document is the warrant or authority to Dr. Stillwell, the superintendent of the asylum, to keep him in custody during Her Majesty's pleasure. On the face of it, that document gives ample and sufficient reason for the course which has been taken, and for Mr. Maltby's detention; but it is not, of course, enough to say that on the face of it it seems sufficient. The court is bound, on an application for a writ of *habeas corpus*, to see whether the foundation of the proceedings was lawful or not. Now the foundation of that warrant seems to me to be the order of the Governor of Madras, which recites the facts in the same way and to the same effect, stating that he was found to be of unsound mind, both by the district magistrate and by the High Court at Madras, and that the Governor of Madras had directed



him to be removed to England. The case seems to me to depend entirely, or almost entirely, on the true construction of sects. 1 and 2 of the statute (14 & 15 Vict.). Sect. 1 is as follows: "If any person shall have been, or shall hereafter be, indicted for or charged with any crime or offence in any court in India, and shall be acquitted of or not tried for such crime or offence on the ground of his being of unsound mind, and shall by reason of the premises be lawfully in custody in India, it shall be lawful" for the Government in India to make an order for his removal to the United Kingdom, to abide the order of Her Majesty. It is also important to bear in mind sect. 2, on which the argument on behalf of the applicant was in a great measure based. By sect. 2, the order and directions of the Indian Government for his removal shall be sufficient warrant to all commanders of vessels and others; and on the arrival of such person in the United Kingdom it shall be lawful for the Crown to give such orders for his custody as if such person had been indicted for an offence and found insane, so as to be subject to 39 & 40 Geo. 3, c. 94. Now, on referring to the older statute (39 & 40 Geo. 3, c. 94), it is certain that that statute did not give the power which is now claimed under the recent one; because, by the older statute, provision is only made for the case of persons who are indicted, and appear on arraignment to be insane, or are found to be so on their trial. But when it is argued that the present contention on behalf of the Crown is bad because of that, it appears to me that such an argument rather begs the whole question, inasmuch as the words of 14 & 15 Vict. c. 81, s. 1, are by no means the same as those of the former statute, and the latter part of sect. 2 only deals with the treatment of persons who come within the statute, not limiting or affecting the class of persons to be dealt with. Therefore, though I think the statute 39 & 40 Geo. 3, c. 94, affects the mode of dealing with the persons, it does not affect the question as to who those persons are, which turns upon the words of sect. 1 of the Act of 1851: "If any person shall be indicted for or charged with any crime or offence in any court in India, and shall be acquitted of or not tried for such crime or offence on the ground of his being found to be of unsound mind." Now, the question is, whether Mr. Maltby came within that description? The answer to that entirely depends on the construction to be put upon that clause. The Act was passed in 1851, at a time when the statute of 39 & 40 Geo. 3 was in force, which, as I have said, applies only where there has been an indictment, arraignment, and trial. The latter statute undoubtedly uses language which is applicable to other cases. The words are larger, and the question is, how much larger. At first sight, I was certainly inclined to think that the words "indicted for or charged with any crime or offence" ought to be construed *reddendo singula singulis*, that is to say, indicted for any crime, or charged with any offence where the court had summary jurisdiction; and therefore that they applied only to a court sitting for the purpose of trial and not

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merely of preliminary inquiry. But I think it is important to remember that this statute deals with persons of unsound mind, and such a statute cannot be looked at as one merely restraining the liberty of the subject. To some extent it is a remedial statute, especially having regard to the fact that it applies to a country like India, where the danger to a European from such a thing as brain disease is greater than it is here, and that its object is the humane one of bringing such a person home, where his prospects of recovery will be greater. I think we are hardly bound to hold that the words of such a statute are to be construed quite as strictly as those of a statute restraining liberty in the United Kingdom, the consequences of the state of things with which it deals being so different. That being so, it appears to me that the words of this statute may be, and ought to be, construed so as to include this case, and I think that it may be done in this way. The words "if any person shall be indicted for or charged with any crime or offence" may be read in this sense, that is to say, so as to include any person indicted for any crime or offence, and any person charged with any crime or offence, and not *reddendo singula singulis*, in the sense which has been suggested. Does the section then include the case of a man who has not been tried for a crime, not actually brought up for trial, but brought before a magistrate, who has to declare whether he ought to be committed for trial? What does "any court" mean? Looking through the code it is impossible to say that the magistrate was not sitting as a court. He went intending to sit, and taking the witnesses to be examined; and was as much a court as any magistrate in England would have been, before recent enactments, when sitting in his own study and inquiring as to a criminal charge. I think the magistrate was holding a court here. Then was the applicant a person "acquitted or not tried on the ground of his being found to be of unsound mind?" There is no doubt whatever that his case was not inquired into, on the ground of his being supposed to be of unsound mind? I think he was "not tried" within the meaning of the statute, and on the ground of his being supposed, at all events, to be of unsound mind. The further difficulty is, that it is argued that the meaning of the words "found to be of unsound mind" contemplates a finding different from the opinion of the magistrate, though based upon his own view and upon undoubtedly sound evidence. This is the difficulty which at first I was disposed to think insuperable; and it is perhaps the greater because the same words "found to be of unsound mind" are used in the former statute, where they unquestionably mean "found by a jury." But I think they are not to be limited here to cases where there has been a finding by a jury, because they must apply to those cases where a magistrate has power to hold a person guilty of an offence charged without any indictment, and without any jury. Do they apply further than that? I think the word "found" quite capable of a larger

construction, and applicable to the case of a magistrate making a preliminary examination on a charge of murder, and coming to the conclusion that the man charged is of unsound mind, and cannot be sent for trial. I think it is not at all straining the words to suppose that the Legislature, when passing this Act, and varying the words of 39 & 40 Geo. 3, c. 94, did intend to give a much larger power, in a remedial sense, for the benefit of persons in India in this condition, and to give the Governor, under these circumstances, the humane and useful power of sending them to England to have the best chance of recovery. Then, when they are once in England, they are subject to Her Majesty's pleasure, and no one has suggested that that pleasure is not beneficially exercised with respect to persons under confinement, for their own sakes as well as for the protection of others. It appears to me that this statute meets the present case. Then our attention has been called to the Code itself. In one sense the Code throws very little light on the matter, because we have to consider the meaning of the statute of 1851 at the time when it was passed, rather than the other powers applicable to India. I think it has not much bearing on the case. Sects. 423-428 of the Code give a power, in my opinion, quite consistent with the statute of 1851. They only give a power which enables persons who are found lunatic—perhaps only when so found by a tribunal competent to try them—to be kept in custody, and brought up from time to time as circumstances may require. They are not inconsistent with this, namely, that, when persons are lawfully in custody there is the further power, under the discretion of the Governor, of sending them to England under the provisions of the 14 & 15 Vict. c. 81. In this particular case we have it before us that an application was made to the High Court at Madras, and that that court, with the matter fully before them, held that the applicant was lawfully in custody in India, and then suggested that this statute might apply. The Governor of Madras proceeded to act under this statute. I think his order is incorrect in reciting his suggestion as to this statute as the judgment of the High Court, but that does not alter the fact that the case is within the statute. I think the proceedings have been right. I should have been sorry if we had been obliged to decide otherwise, because of the disastrous consequences which would have ensued—disastrous to no one more than the applicant himself, if discharged under a writ of *habeas corpus*, and exposed to the evils and excitement of a recommencement of all these proceedings.

POLLOCK, B.—I think this writ ought not to go, and that the rule must be discharged. It is unnecessary to consider the question of the discretion which has been exercised in this case. The whole foundation of the proceedings, in my opinion, is the statute of 1851 (14 & 15 Vict. c. 81), and it is clearly necessary for us to go back to the inception of the jurisdiction by which the applicant was sent to England. Now sect. 1 of this Act requires, as a foundation for proceeding, that the person should

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be "found of unsound mind"; and, having regard to the circumstances under which the Act was passed, it is quite clear that the words "found" point to a finding by a magistrate at a much earlier stage than persons are so found in this country on indictment and arraignment. It was argued that, of the words in the first section, "indicted for or charged with any crime or offence," the words "indicted for any crime" are applicable to cases of indictment where an indictment is proper, and that the words "charged with any offence" are applicable to cases where a magistrate has summary jurisdiction without any indictment. No authority, however, has been cited to show that any technical meaning was attributable to the word "charge" in India when the statute was passed. In the case of *Reg. v. Hughes* (40 L. T. Rep. N. S. 685; L. Rep. 4 Q. B. Div. 614; 14 Cox C. C. 284) the meaning of the word "charge" was carefully considered, and it was held that it in no way involves a written information. In *Reg. v. Shaw* (34 L. J. 169, M. C.) Erle, C.J. said: "In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence imposes the necessity of taking some such step." That is an opinion with which I think that a great many judges have agreed for a good many years. But the matter does not end there. Looking at sect. 1 of the Act in question, we find it a condition precedent that the person shall have been "acquitted of or not tried for" the offence charged, on the ground that he was of unsound mind. We must therefore look at the present mode of trying or not trying persons under such circumstances in India. I find that the magistrate here was holding a criminal court, because, by the interpretation clause of the Criminal Code, he was a court for all purposes. Then, by sect. 423 of the Code, a process is provided whereby, if a person appears to be of unsound mind, the magistrate is to institute an inquiry in certain cases, that is say, where he has jurisdiction to try the charge; but where, as here, he has no jurisdiction to try the charge, then sect. 424 applies, and gives him power to stay further proceedings in the case. It is therefore clear, looking at this as a matter of procedure, that when a magistrate does stay proceedings under these provisions of the Code (Act, 1872), he is putting the person charged in the position of a person "not tried," on the ground that he is of unsound mind. It was said that this inquiry was conducted behind the back of the person chiefly concerned; but I do not at all think that the statute intended that there should be a trial of this question in open court, the supposed lunatic being present. Then it was contended further that in this case the magistrate had never had this man charged before him, in the sense of being actually brought before him while sitting on the seat of justice. What did happen was this. The magistrate was told of the

condition of this gentleman at the same time that the charge was made, and no doubt the course which he took was somewhat informal. Instead of sending for the person charged, he went to him at the bungalow where he was, just as in England a justice of the peace might have gone, for example, to a man in hospital. I think that the statute was complied with, and that all that was necessary to give the magistrate jurisdiction was done; that inquiry was properly instituted, and that when instituted it gave the magistrate power, on the information he received, to send the accused person to Madras; that the order made by the Government there was within the powers conferred by 14 & 15 Vict. c. 81, and that the applicant is now properly detained in custody under the warrant of the Secretary of State.

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*Rule discharged.*

Solicitors for the applicant, *Cobbold and Woolley.*  
Solicitor for the Crown, *Solicitor for the Treasury.*

## COURT OF APPEAL.

*May 13 and 14, 1881.*

(Before JAMES, BAGGALLAY, and LUSH, L.JJ.)

*WHITMORE v. FARLEY. (a)*

*Agreement to compromise criminal prosecution—Larceny by bailee—Deposit of deeds—Delivery up of deeds—Statute of Frauds.*

*A. having been arrested at the instance of B., on the charge of having committed the offence of larceny by a bailee, was brought up before a magistrate and remanded. A.'s wife then induced B. to withdraw from the prosecution on A.'s wife agreeing to charge her separate real estate with the amount taken. The title deeds of the property were deposited at a bank in the joint names of the solicitors of the parties. A. being again brought before the magistrate, the latter, having been informed of the terms, allowed the prosecution to be withdrawn. A.'s wife afterwards refused to perform her agreement. B. brought an action to enforce the charge, and A.'s wife counter-claimed for a declaration that she was entitled to have the deeds delivered up to her.*

*Held (affirming the decision of Fry, J., 43 L. T. Rep. N. S. 192), that the agreement to charge the separate property was illegal and could not be enforced, and that the defendant was entitled to the declaration for the delivery of the deeds.*

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

WHITMORE	<i>Larceny by a bailee is a felony, but, if it had been a misdemeanour,</i>
v.	<i>the agreement to charge in consideration of the withdrawal of the</i>
FARLEY.	<i>prosecution would have been void.</i>
1881.	<i>Quære, as to the rule laid down by Fry, J., that a deposit of</i>
Compromise of criminal pro- ceedings.	<i>title deeds in pursuance of a contract to charge real estate is a sufficient part performance to take the case out of the Statute of Frauds.</i>

THE plaintiff, Miss Whitmore, in the early part of 1878, placed in the hands of one of the defendants, J. N. Anstruther, a financial agent and money lender, certain securities which belonged to her of the value of about 800*l.*, and on which the said defendant was to raise money; but he was not to part with the securities, and was to pay interest thereon.

On the 14th day of March, 1878, an agreement was signed by the plaintiff and the said defendant, by which the said defendant undertook to hold the securities on certain terms, and to return the same to the plaintiff on six months' notice. The six months' notice was given to the said defendant by the plaintiff on the same day.

The six months' notice expired on the 14th day of September 1878, but the defendant failed to return the securities with the exception of one of them. Time elapsed, but no more of the securities were returned, and on the 27th day of July, 1879, the defendant was adjudicated a bankrupt. The plaintiff received notice of the proceedings, and that she had been included in the list of creditors.

On the 5th day of September, 1879, the plaintiff swore an information against the defendant for the crime of larceny by a bailee, and he was arrested on the 8th.

On the 9th day of September the defendant was brought up at the Mansion House before Sir A. Lusk, and remanded till the 11th.

On the 10th day of September the defendant, Mrs. Anstruther, the wife of J. N. Anstruther, went with a solicitor to call upon the plaintiff at her residence in Sussex for the purpose of obtaining the withdrawal of the prosecution against J. N. Anstruther. Some terms were proposed by Mrs. Anstruther, but the plaintiff declined to withdraw from the prosecution without the advice of her solicitor.

The next morning, before the time for the hearing arrived, an interview took place between the plaintiff and Mrs. Anstruther, and their respective solicitors, at which an agreement was come to by which the prosecution was to be withdrawn, if the consent of the Lord Mayor, or the alderman representing him, could be obtained, and Mrs. Anstruther was to charge her separate estate with the loss which the plaintiff had incurred through the conduct of Mr. Anstruther. After the interview, Mrs. Anstruther's solicitor, accompanied by a Mr. Leader (a clerk of the plaintiff's solicitor), proceeded to Messrs. Hoare's bank, and



there deposited the title deeds of a certain freehold property, which was vested in the defendant G. C. Farley, as a trustee for Mrs. Anstruther's separate use, such deposit being made in the joint names of the firm of solicitors of Mrs. Anstruther, who had a charge upon the property, and of Mr. Leader, the deeds not to be delivered without a joint receipt.

When the case was called on at the Mansion House, before Sir A. Lusk, the solicitor who appeared for J. N. Anstruther informed the alderman that the plaintiff had agreed to withdraw from the prosecution, Mrs. Anstruther being prepared to give a charge on her separate estate for her husband's defalcations.

Sir A. Lusk gave his sanction to the prosecution being withdrawn, which was accordingly done.

The defendant, Mrs. Anstruther, subsequently declined to make good to the plaintiff the loss which she had sustained, and, on the 19th day of November, 1879, the present action was commenced by the plaintiff against Mr. and Mrs. Anstruther, and the latter's trustee, in which the plaintiff sought to charge the separate estate of Mrs. Anstruther with the sum in question.

Mrs. Anstruther, by her defence, set out the facts as to the prosecution of her husband, but did not expressly rely on the illegality of the compromise of the criminal proceedings. She also denied that any agreement had been arrived at, or that the transactions between her and the plaintiff had progressed beyond mere negotiations, and she alleged that J. N. Anstruther had been discharged because no case had been shown to support the charge against him; and she also pleaded the Statute of Frauds, the agreement not having been reduced to writing or signed. She also put in a counter-claim, by which she claimed a declaration as against the plaintiff that she was entitled to the delivery up to her of the title deeds.

The action was tried in June and July, 1880, before Fry, J., who held that the deposit of title deeds in pursuance of the contract was a sufficient part performance to take the case out of the Statute of Frauds. He also held that the agreement alleged had been entered into by Mrs. Anstruther, but that it was against public policy, and could not be enforced. He dismissed the action, without costs, and made the declaration claimed by Mrs. Anstruther.

The decision of Fry, J. is reported 43 L. T. Rep. N. S. 192.

The plaintiff appealed.

*Fischer*, Q.C. and *Oswald* for the appellant.—It is illegal to compound a felony, but not to compound a misdemeanour. Anstruther was not charged with a felony, but with the offence of larceny by a bailee, which is not a felony, but a misdemeanour. The offence of taking goods by a bailee was not a felony at the common law, or, indeed, punishable as a crime. In 1861, it was enacted that, whosoever, being a bailee of any chattel, money, or valuable security, should fraudulently take or convert the same to

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his own use, should be guilty of larceny, and might be indicted for larceny: (24 & 25 Vict. c. 96, s. 3.) The section does not say the offender is guilty of felony. [LUSH, L.J.—Larceny, generally, is felony, and, if the Legislature had meant that this particular larceny should not be a felony, it would have said so.] There are many cases of larceny under the same statute, which are also expressly defined as felonies, as larceny of cattle (sect. 10); larceny of written instruments (sect. 27). [LUSH, L.J.—Is there any case of larceny which the statute says shall not be a felony?] Yes; taking or killing hares is, under sect. 17, a misdemeanour only. [LUSH, L.J.—“Taking” there does not mean stealing, but catching.] Even supposing that the offence charged was a felony, the plaintiff has fulfilled her duty by commencing the prosecution: (*Ex parte Ball*; *Re Shepherd*, 40 L. T. Rep. N. S. 141; L. Rep. 10 Ch. Div. 667.) The mere withdrawal from the prosecution was not an illegal act; for, supposing that the offence of larceny by a bailee is a felony, the charge might not have been substantiated. When the matter was tried out, it might have appeared that the person was not guilty of a felony at all. You must be satisfied from the evidence on both sides that a felony was actually committed before you can say that a felony has been compounded. [BAGGALLAY, L.J.—It is sufficient to found the offence of compounding, if a charge of felony is made. LUSH, L.J.—The charge only is considered, otherwise every offence might be compromised by stopping the case at an early stage: (see *Keir v. Leeman*, 3 L. T. Rep. O. S. 299; 6 Q. B. N. S. 308; affirmed 7 L. T. Rep. O. S. 347; 9 Q. B. N. S. 371)]. In this case the case never got as far as an indictment, and if it had, no charge of felony could have been made out, for the offence was that of a trustee fraudulently disposing of property, which is a misdemeanour: (24 & 25 Vict. c. 96, s. 80.) If that is so, the remedy of the party injured is expressly reserved: (*Id.*, s. 86.) No complaint can be made when the magistrate has consented to the prosecution being withdrawn; he represents the public. [LUSH, L.J.—For aught I know the magistrate might be indicted. It was held in *Keir v. Leeman* (*sup.*) that even a judge of assize could not allow a prosecution to be compromised. JAMES, L.J.—The agreement would not have been made legal if the Lord Chief Justice, the Lord High Chancellor, and all the judges of the Court of Appeal had consented to it.] The parties have not set up the illegality of the agreement. The judge himself raised the question. [JAMES, L.J.—The Court is bound to take notice of the illegality of a transaction, although both parties wish it to be passed over.] The defendant cannot now set up the illegality, as, after the pleadings which have been delivered, it would be a surprise on the plaintiff: (Order XIX., r. 18.) [JAMES, L.J.—Nobody can be surprised by learning the law, as everyone is presumed to know it.] Illegality must be expressly pleaded; mere denial of a contract only denies the making: (Order XIX., r. 23.) [JAMES, L.J.—That is only the

old rule that under a plea of *non est factum* you could not prove illegality, but to do that you must set out the circumstances.] The facts showing the illegality must be clearly shown even if the agreement is not said to be illegal: (*Haigh v. Kaye*, 26 L. T. Rep. N. S. 675; L. Rep. 7 Ch. App. 469.) The declaration in favour of the defendant cannot be sustained. If the money had actually been paid over to the plaintiff no action would have lain for its recovery: *In pari delicto potior est conditio possidentis*. [*North*, Q.C., referred to *Williams v. Bayley* (14 L. T. Rep. N. S. 802; L. Rep. 1 E. & I. App. 200).] That was a case of pressure. They also referred to *White v. Spettigue* (13 M. & W. 603); *Davies v. London and Provincial Marine Insurance Society* (38 L. T. Rep. N. S. 478; L. Rep. 8 Ch. Div. 469); *Osbaldiston v. Simpson* (1 L. T. Rep. O. S. 335; 13 Sim. 513).

*North*, Q.C., and *Godefroi*, for the defendants, were not called on.

JAMES, L.J.—This case has been argued at length and with perseverance. It is a case of great hardship on the plaintiff, who has lost a considerable sum of money through the default of the husband of the defendant Mrs. Anstruther. However hard the case may be, we must decide it upon principles of law, and those are as plain and clear as ever occurred in any court. The facts of the case which raised the question to be decided are shortly as follows. There was a criminal prosecution for larceny by a bailee, which is felony. Whether it was a felony or misdemeanour does not matter so far as this case is concerned. The husband was in the dock. His wife desired to relieve him from the prosecution. She proposed to give a security on her separate property to stop the prosecutrix from proceeding. That proposal was acceded to by the prosecutrix. In the course of the negotiations the title deeds relating to Mrs. Anstruther's property were handed over to a bank. No evidence has been given as to what was precisely agreed upon, but it has been clearly shown what was intended to be done. The learned judge in the court below himself took the objection that an illegal agreement was sought to be given effect to, as it is the duty of every court to take the objection when such facts appear as to show that something has been done to stop a criminal prosecution. The court is bound to say, "We will do nothing to enforce such an agreement against public policy." I think any party setting up such case would probably think twice before he admitted in his pleading that he had been party to such an agreement. The authorities clearly show that what was done here was an offence which might have been made the subject of a prosecution. It is said that there is a difference in this case from the ordinary offence of compounding a felony by the fact of the presiding magistrate having consented to reparation being made to the prosecutrix. There might be something to be said on that score as to the amount of punishment to be inflicted on the offender; but if authority were wanted to show that what

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was done did not make the affair lawful, there is a decision of the Exchequer Chamber in *Keir v. Leeman* (*ubi sup.*) that even a judge of assize cannot lawfully consent to such a compromise of a prosecution for felony. It is said by the appellant's counsel that the judge in the court below has not only denied the plaintiff the relief to which she was entitled, but that such judge has given the defendant relief, thus ignoring the maxim *In pari delicto potior est conditio possidentis*, and that no relief ought to have been given to Mrs. Anstruther on the counter-claim set up by her. Independently of the cases which have been cited to me, it has been decided in the House of Lords in *Williams v. Bayley* (*ubi sup.*), that where there has been pressure in cases like this the court will grant relief to the person upon whom such pressure has been put. But here what has been done is that a declaration has been made which is a logical result of what was claimed by the plaintiff in the action. Miss Whitmore says: "I have a charge upon Mrs. Anstruther's separate estate." The court declares, in answer to Miss Whitmore's question, that she has no such charge. Thereupon Mrs. Anstruther and her estate are necessarily held to be free from the charge which has been claimed. The court thinking the case a hard one, did even more for the plaintiff than she was entitled to ask should be done, for it made no order as to costs, although it is impossible to say that the action was not unfounded. Having obtained a decision of a competent court on a point which was evidently clearly against the plaintiff, she chooses to bring an appeal from such decision. She does so at her own risk, and, although her case is a hard one, I see no reason for making any exception to the rule as to costs. In my opinion the appeal should be dismissed with costs.

BAGGALLAY, L.J. [after stating the facts, continued:]—I am clear that, upon the authorities, it is immaterial whether the charge which was attempted to be compromised was a felony or only a misdemeanour. Any agreement to compound a criminal prosecution for a public offence is illegal, and it is wholly immaterial that such agreement has received the sanction in court of the magistrate before whom the charge was brought. The sanction of the magistrate cannot render valid a transaction which would otherwise be illegal. I am of opinion, therefore, that the appeal must be dismissed.

LUSH, L.J.—I am of the same opinion. I share fully in the sympathy which has already been expressed for the plaintiff, but I cannot give legal effect to my sympathy. There is no doubt that to compound a felony is an illegal act, and also a crime which renders the person guilty of committing it liable to punishment. Every agreement, therefore, by which a prosecutor, in consideration of a private benefit, has consented to compound or withdraw from a charge of felony is one which, on account of its illegality, the court will not enforce. There is certainly no legal obligation on a person who has suffered injury by the commission

of a felony to prosecute the person who has committed the crime ; but if he has once instituted the prosecution, he has acted on behalf of the public, and used the name of the Sovereign as representing the public, and cannot legally enter into a binding agreement to discontinue the prosecution. The cases clearly establish that any such agreement in consideration of a benefit to the prosecutor is illegal and cannot be enforced. It is utterly immaterial whether the charge is proved or not, if once it has been made. Although the offence here was a felony, it would not matter if it were a misdemeanour. There are, no doubt, certain cases, as that of an assault, where the parties may compromise the offence without being guilty of an illegal act. But this does not apply to misdemeanours of a serious kind. Embezzlement is only a misdemeanour, yet it is a criminal offence to compromise a prosecution for embezzlement. The principle has been stated by Lord Abinger, C.B., in the case of *Davies v. Holding* (1 M. & W. 159). The Court there held that an agreement which was illegal and void, as being against the general policy of the law, should not be enforced, and applied the doctrine to an agreement to abandon a fiat in bankruptcy. The doctrine has also been applied in cases where a debtor has entered into a bargain with certain creditors not to oppose him in obtaining a composition with the general body of his creditors. It is a well-established doctrine that an agreement to forego public rights is an illegal agreement. Whether the felony could have been proved here or not there is no doubt that a criminal charge was made, and the prosecutrix could not legally withdraw it. The fact that the presiding magistrate consented to such withdrawal of the charge does not make it legal. The claim set up by Miss Whitmore cannot be made the subject of an action. Then nobody can invoke the authority of the court to give effect to an illegal agreement, and there is no doubt that the judge was quite right in interfering and of his own motion pointing out the illegality of the transaction, and the impossibility of allowing the plaintiff's claim. There was, however, quite enough on the pleadings, without the interference of the judge, to set up the defence of illegality. We are quite at liberty, where facts are stated which show an illegal act, to allow a case of illegality to be proved, although it is not expressly stated in the pleadings that the defendant pleads illegality.

JAMES, L.J.—I desire to be understood as giving no opinion, either way, on the point decided in the court below as to the Statute of Frauds. That point requires to be further considered if it ever arises again.

Solicitor for the appellant, *F. Bradley*.

Solicitors for the defendants, *Remnant, Penley, and Grubbe*.

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HIGH COURT OF JUSTICE.  
QUEEN'S BENCH DIVISION.

*June 25 and July 2, 1881.*

(Before Mr. Justice STEPHEN.)

WILSON v. STRUGNELL. (a)

*Bail—Contract to indemnify, illegality of—Municipal Corporation Act 1835 (5 & 6 Will. 4, c. 76), ss. 57, 101—Borough without commission of peace—Jurisdiction of mayor to act as justice of peace.*

*A contract to indemnify bail against the consequences of the non-appearance of an accused person is contrary to public policy, and therefore illegal.*

*The defendant became bail in 100l. for the appearance of M. upon a charge of embezzlement. M. paid 100l. to the defendant to indemnify him for becoming bail, and then absconded.*

*Held, that the plaintiff, the trustee in bankruptcy of M., was entitled to recover that sum from the defendant; for, although the contract to indemnify the defendant was against public policy, yet it remained executory, in the absence of any evidence to show that the liability of the defendant, as bail, had been discharged.*

*The mayor of a borough named in Schedule B. of the Municipal Corporation Act, 1835 (5 & 6 Will. 4, c. 76), which has no separate commission of the peace, has jurisdiction under sects. 57 and 101, to act as a justice of the peace for the borough.*

**FURTHER CONSIDERATION.**

This was an action tried before Stephen, J. in Middlesex, on the 12th day of May, 1881, and heard on further consideration on the 25th day of June. The facts were as follows:—Manners was charged on the 27th day of September, 1879, before the Mayor of Shaftesbury, with embezzlement, and was by him remanded to appear before the county magistrates at Shaftesbury on the 30th. Manners was bound over to appear, and Strugnell gave bail to the extent of 100l. for his appearance. Strugnell received 100l. from Manners as security for becoming bail. On the 30th Manners did not appear before the county magistrates.

Shaftesbury is one of the boroughs in Schedule B. of the

(a) Reported by W. E. GORDON, Esq. Barrister-at-Law.



Municipal Corporation Act, 1835, and has a mayor, but no separate commission of the peace. The county magistrates do not recognise the right of the mayor to remand prisoners for appearance before the county bench. There was no evidence at all as to their having taken any step in consequence of the non-appearance of Manners with reference to the recognisances, but they received an information on oath against him and issued a warrant for his apprehension. He has not since been heard of.

On the 18th day of May, 1880, Manners was adjudicated a bankrupt, and Wilson, the trustee in bankruptcy, sued Strugnell to recover from him the 100*l.* paid to him by Manners.

*Atherley Jones* for the plaintiff.—Assuming that the contract to indemnify bail is contrary to public policy, and therefore illegal (*Jones v. Orchard*, 24 L. J. 229, C. P.; 16 C. B. 614), the plaintiff is still entitled to recover back this money from the defendant on the ground that the contract remains executory. The doctrine is clearly laid down in Roscoe on Evidence (ed. 14, p. 557), that “where money has been paid in pursuance of an illegal contract, it is generally irrecoverable; and there is no distinction in this respect between *mala prohibita* and *mala in se*. But in some cases it is recoverable as money had and received to the use of the party paying it, *e.g.*, when the contract remains executory, though the plaintiff and defendant be *in pari delicto*.” The present case bears a striking analogy to that of *Bone v. Ekless* (5 H. & N. 925; 29 L. J. 438, Ex.), which was decided on the principle that where money, which has been paid over in pursuance of an illegal agreement, has not been applied to the purpose intended, it is open to the parties to demand it back. So here, as the consideration is illegal and the contract has not been executed, the money is recoverable. See also *Symes v. Hughes* (22 L. T. Rep. N. S. 462; L. Rep. 9 Eq. 475; 39 L. J. 304, Ch.); *Tenant v. Elliott* (1 Bos. & P. 3). Again, assuming that Manners could not recover this money back, nevertheless there is nothing to prevent the trustee in bankruptcy from recovering it from the defendant: (*Midland Counties Assurance Company v. Smith*, 6 Q. B. Div. 561; 50 L. J. 329, Q. B.; *Re Shepherd*; *Ex parte Ball*, 40 L. T. Rep. N. S. 141; 10 Ch. Div. 667; 48 L. J. 57, Bank.) Lastly, the Mayor of Shaftesbury had no power to take the recognisance here. The local jurisdiction of all magistrates must be derived from the commission of the peace. The borough of Shaftesbury has no commission of the peace, and therefore the mayor had no jurisdiction to take recognisances. The recognisance being invalid, the trustee is entitled to recover this sum, which was paid without consideration as money had and received. He referred to Municipal Corporation Act, 1835 (5 & 6 Will. 4, c. 76), ss. 57, 98, 107, and schedule B.; 11 & 12 Vict. c. 42, s. 16; Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 9.

*J. Alderson Foote* for the defendant.—As to the last point, sect. 57 of the Municipal Corporations Act expressly provides that the

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mayor, for the time being, of every borough is to be a justice of the peace of such borough. Again, the agreement to indemnify must be against the policy of the law; if such an arrangement could be made, the court would only be able to obtain a surety in the case of rich men who would supply the money to indemnify the bail if the recognisances be estreated. In *Jones v. Orchard* (*sup.*), it seems to have been admitted in argument that an agreement to indemnify bail is illegal. This case, although not a direct authority, is still in favour of this contention. Cresswell, J. there says (24 L. J., at p. 230, C. P.), "What is the use of requiring sureties for a defendant's appearance if they are entitled to be indemnified by the defendant?" and Jervis, C.J. also remarked that "it cannot be maintained that the plaintiff is entitled to recover if the recognisance was forfeited by reason of the defendant's non-appearance. There cannot be a good express promise to indemnify against the defendant's non-appearance, and therefore a good promise cannot be implied." In the present case it is contended for the plaintiff that, even if the contract to indemnify was illegal, the money could be recovered by the trustee on the ground that the contract remained executory; but the real test, as stated in Broom's Legal Maxims (ed. 5), at p. 722, "for determining whether or not the objection that the plaintiff and defendant were *in pari delicto* can be sustained, is by considering whether the plaintiff can make out his case otherwise than through the medium, and by the aid of the illegal transaction to which he was himself a party:" *Taylor v. Ohester* (L. Rep. 4 Q. B. D. 309; 21 L. T. Rep. N. S. 359); *Fivaz v. Nicholls* (2 C. B. 501); *Simpson v. Bloss* (7 Taunt. 246). The trustee is in no better position than the bankrupt, and cannot recover in this action: *Nicholson v. Gooch* (5 E. & B. 999). The cases cited on behalf of the plaintiff are not in point, because there the money was paid to the defendants, who had to hand it over to some third person, in pursuance of the illegal contract. In the present case the illegality arose as soon as the defendant received the 100*l.* and became bail. In *Bone v. Ekless* (5 H. & N. 925) there was nothing illegal in the payment over of the money, the only illegality was bribing the Turkish officials. He also referred to Broom's Legal Maxims, ed. 5, p. 739, citing *Holman v. Johnson* (Cowp. 343, per Lord Mansfield).

*Jones* replied.

*Our. adv. vult.*

July 2.—STEPHEN, J., after stating the facts as given above, proceeded:—It was argued for the plaintiff that the Mayor of Shaftesbury had no power to take the recognisances, and that the 100*l.* was therefore paid without consideration, and could be recovered by Manners' trustee as money paid to his use. This was denied on the part of the defendant. It was also argued by the plaintiff that, even if the recognisance was valid, the consideration for the contract to indemnify had failed, as it did not appear

that the recognisances had been forfeited, and as it did appear that the first prosecution had been dropped, the county magistrates having instituted, but on their own account, an entirely new one. To this the defendant replied that the burden of proving that the defendant was relieved from responsibility was on the plaintiff, and that he had failed to prove it. Further, however, it was alleged by the defendant that the contract was illegal, and that as the defendant was in possession of the money he was entitled to retain it, and to this the plaintiff replied that if the contract was illegal the plaintiff was entitled to recover the money, because the illegal consideration had not been executed, and that, at all events, his trustee in bankruptcy was so entitled whether he was or not. I will dispose of these arguments successively. In the first place I hold that the Mayor of Shaftesbury was entitled to hold Manners to bail to appear before the county magistrates. By sect. 57 the mayor of every borough, in either schedule to the Municipal Corporation Act (5 & 6 Will. 4, c. 76), is to be a justice of the peace of and for the borough, and though no separate commission of the peace has been given to Shaftesbury under sect. 98, and all criminal jurisdiction vested in any corporation or chartered officer by any earlier law or charter is taken away by sect. 107, and though the county magistrates have concurrent jurisdiction in the borough under sect. 111, and though there is no evidence that the Mayor of Shaftesbury is in the commission of the peace for the county of Dorset, I think that the terms of sects. 57 and 101 make the mayor a magistrate for the borough, and require him to act as such. Nor do I understand the grounds on which it is said the county magistrates refuse to recognise his jurisdiction. I think, accordingly, that the recognisance was valid originally. In the second place, it does not appear what has become of the recognisances or whether they have or have not been indorsed under 11 & 12 Vict. c. 47, s. 21; or whether or not they have been dealt with in any, or if so, in what way under the Summary Jurisdiction Act (42 & 43 Vict. c. 49, s. 9) does not appear. Hence there is no evidence to show that the liability arising under the recognisance has been in any way discharged, and this being so I must presume that it continues. In the third place, I am of opinion that the contract to indemnify the bail against his liability was contrary to public policy, and, therefore illegal and void, I should have been prepared to hold this upon the obvious principle that the effect of the contract is to deprive the public of the security of the bail, but I think that the opinion of the court, in *Jones v. Orchard* (16 C. B. 614), is a direct authority in favour of the view which I take, though the judgment of the court in that case proceeded on another point. The money, therefore, must be taken to have been paid to the defendant by Manners on an illegal consideration, and the question is whether under these circumstances Strugnell can keep it or Manners' trustee reclaim it. Before considering this question it seems to me essential to observe that, if the contract had been

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good, and if the liability of the defendant had been determined, it is clear that Manners would have been entitled to recover the money. It was paid to Strugnell only to indemnify him against eventual loss, and if Manners had appeared in discharge of his recognisances he would have been entitled to recover his 100*l*. I was referred to two classes of cases which have no degree of resemblance to each other (though I think they are really quite consistent and distinct), to each of which this case was attempted to be referred. The defendant cited *Taylor v. Chester* (L. Rep. 4 Q. B. 309) and some earlier cases. The plaintiff cited *Bone v. Ekless* (5 H. & N. 925), which has been followed by the case of *Taylor v. Bowers* (34 L. T. Rep. N. S. 938; 1 Q. B. Div. 291), also *Symes v. Hughes* (L. Rep. 9 Eq. 475). Many other cases might be referred to, but I think that all of them are consistent and reducible to plain and familiar principles. The principle is, that where money has been actually paid upon an immoral or illegal consideration fully executed and carried out, it cannot be recovered by the person who paid it from the person to whom it was paid; but that where money has been paid to a person in order to effect an illegal purpose with it, the person making the payment may recover the money back before the purpose is effected. The question, therefore, in the present case appears to me to reduce itself to this: Has the arrangement made between Manners and Strugnell been executed or not? I think it has not. In one sense no doubt Strugnell is indemnified so long as he holds the 100*l*.; but it is only against any risk to which he is exposed, and by reason of his having become bail for Manners, that is to say, he has the means of repaying himself for any loss to which he may be put hereafter; but I do not think that the matter can be said to have been fully completed until the sum has been actually and finally applied to the purpose of repaying him for a loss actually sustained by him. Till the recognisance is forfeited and the money applied to the payment of the sum for which he is liable, the transaction, as it seems to me, is still incomplete, and either Manners or his trustee (for I do not rely on any distinction between them) has a right to require the repayment of the money. The result is that I give judgment for the plaintiff for 100*l*. and costs.

*Judgment accordingly.*

Solicitors for the plaintiff, *Kingsford, Dorman, and Co.*

Solicitors for the defendant, *Gregory, Rowcliffe, and Co.* for *T. Trevor Davies, Yeovil.*

## COURT OF APPEAL.

Thursday, Nov. 10, 1881.

(Before JESSEL, M.R., LUSH and LINDLEY, L.JJ.)

*Ex parte GRAVES ; Re HARRIS. (a)*

*Bankruptcy—Convicted felon—Liability to be made bankrupt—Felony Act, 1870 (33 & 34 Vict. c. 23), ss. 7 and 8—Bankruptcy Act, 1869, s. 6, sub-sect. 6.*

*A convicted felon may be adjudicated a bankrupt on an act of bankruptcy committed either before or after his conviction.*

*If a debtor's summons be served on a convicted felon during his imprisonment, his neglect to pay, secure, or compound for the debt will be an act of bankruptcy.*

GEORGE HARRIS, the debtor, had been the confidential clerk of Mr. Henry Graves, the publisher, of 6, Pall Mall.

In May, 1881, Harris was convicted at the Old Bailey of embezzling the money of his employer, and of forgery, and was sentenced to seven years' penal servitude.

On the 23rd day of May, after the conviction, a debtor's summons was issued by Graves against Harris for 80*l.* 8*s.*, the amount of a cheque which had been handed by Graves to Harris on the 10th day of Aug. 1876, to be paid into the bank, but which was then cashed by Harris and applied to his own use.

The facts as to this cheque were not discovered until after the conviction.

The debtor's summons was, on the 23rd day of May, 1881, served on the debtor in Newgate Prison.

On the 15th day of June Harris applied to have the summons dismissed on the ground that the money had been repaid to Graves. Mr. Registrar Hazlitt dismissed this application.

The debtor having made default in paying or giving satisfaction for the amount mentioned in the debtor's summons, Graves, on the 23rd day of June, filed a bankruptcy petition against Harris, founded on the act of bankruptcy alleged to be committed by Harris in making such default.

This petition was served on Harris in Pentonville Convict

(a) Reported by FRANK EVANS, Esq., Barrister-at-Law.

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Prison, and on the 20th day of August came on for hearing before Mr. Registrar Brougham sitting as Chief Judge in Bankruptcy. The learned Registrar dismissed the petition.

Graves appealed.

*Sidney Woolf* for the appellant.—The debtor has committed an act of bankruptcy by neglecting to comply with the debtor's summons: (Bankruptcy Act 1869, s. 6, sub-sect. 6). The fact that he is a convicted felon makes no difference. The registrar seems to think that since the Felony Act, 1870 (33 & 34 Vict. c. 23) a creditor who wishes to obtain payment of his debt ought to get the appointment of an administrator or an interim curator. Forfeiture for felony was abolished by the Act, and the goods of the felon still belong to him. The debtor, although in penal servitude, may neglect to comply with the debtor's summons. The 7th section of the Felony Act provides that when any convict shall "be made bankrupt he shall thenceforth, so far as relates to the provisions hereinafter contained, cease to be subject to the operation of this Act." Possibly the registrar took the view that there must be an act of bankruptcy committed before the conviction. [JESSEL, M.R.—Whether the act of bankruptcy was committed before or after the conviction, the same observation applies. Why should he not make the man a bankrupt? Under the 8th section of the Bankruptcy Act, 1869, there may be a judicial discretion not to make a man a bankrupt because it is no use doing so.] That was not the registrar's reason for not making the adjudication. By the 15th section of the Felony Act the rights of persons like Mr. Graves are reserved, there being a provision that the Act is not to prejudice any right of a person who has suffered loss or injury by any criminal or fraudulent act of the convict. [He was stopped.]

*Winslow, Q.C.* and *Finlay Knight*, for the debtor.—By the 8th section of the Felony Act, 1870, no action or suit for recovery of any property, debt, or damage, shall be brought by any convict during the time while he is subject to the Act, and "every convict shall be incapable, during such time as aforesaid, of alienating or charging any property or of making any contract, save as hereinafter provided." "Alienating" includes paying away money, and, if the debtor had the money and handed it to this creditor, the latter would not be properly paid. [LUSH, L.J.—Suppose an action were brought against the convict, could that be stayed?] It would come to no effect. [LUSH, L.J.—He is bound to pay his debts although he is a convict. JESSEL, M.R.—A creditor can issue execution under the 3rd and 4th sections of the Felony Act for costs, if an order is made against him for costs.] All his property is to be taken possession of under the statute. [JESSEL, M.R.—Not at all. There is nothing to compel the Queen to appoint an administrator. It was only intended to appoint an administrator in the case of a very large property.] Under the 21st section, if no administrator has been appointed, an interim curator may be appointed

by the justices. [JESSEL, M.R.—It is not intended to be a creditor's administration, but to prevent other people from plundering his property while he is in prison. The 22nd section requires an oath as to the nearest relatives.] The Act was passed as much for the benefit of creditors as of debtors. It intended to give the creditors a means to obtain that payment which they had formerly a right to when the goods became the property of the Crown. [JESSEL, M.R.—Surely not. The creditors' rights are preserved by the 27th section, which provides that judgments for payment of money, obtained before or after the conviction, may be executed against any property under the care of the interim curator or administrator.] The 7th section applies only to adjudication on acts of bankruptcy committed before the conviction, because it was necessary that the trustees' title should relate back, and have priority over an alienation made while the convict was competent to alienate. It was not intended that, after the power to alienate was taken away, a convict should be liable for neglecting to pay his debts. [JESSEL, M.R.—That argument applies equally well to an act of bankruptcy committed before.] No. Formerly, when the prisoner thought he would be convicted, he assigned away all his property. Such an assignment was an act of bankruptcy, and it was to reach that that the word "bankrupt" was left in the 7th section. Suppose a man were liable to be put in the pillory for neglecting to pay a debt, and then a statute was passed forbidding him to pay his debts, would he still be liable to be put in the pillory if he paid them? When a creditor issuing a debtor's summons puts an impediment in the way of payment by the debtor, the debtor cannot avail himself of the nonpayment as an act of bankruptcy.

JESSEL, M.R.—There seems to have been some misapprehension about this matter. A convict is liable to pay his debts, and the 27th section of the "Act to abolish forfeiture for treason and felony" (33 & 34 Vict. c. 23) expressly reserves the right to every creditor to issue execution as before. If we were to listen to the argument addressed to us on behalf of the convict, the result would be this, that the creditor who first issued execution would get possession; and general distribution, which is the theory of bankruptcy, would not take place at all. It is of no benefit to the convict, if he is solvent; he can get an administrator appointed, and get his debts paid; it is only in the case of insolvency that you really want to resort to proceedings in bankruptcy. Then it is suggested that the Act of Parliament has made it impossible for the debtor to commit an act of bankruptcy, because it says he shall not alienate his property. What that means is plain enough. It means that he shall not make away with his property to the prejudice of his creditors. But to infer that the Act of Parliament suggested that an insolvent convict should not pay his debts after conviction is really to attribute an intention to the Legislature which ought not to be attributed unless you find it

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expressed in such words as would render it quite impossible to attribute any other meaning to it. Indeed the courts have gone further, and have declined to attribute absurdity to the Legislature, even where that was the literal meaning of the words, if it was possible from the context of the Act of Parliament, having regard to the proper accustomed meaning of the words, that any other construction could be put upon them. It appears to me that this appeal ought to be allowed.

LUSH, L.J.—I am of the same opinion. The Felony Act leaves a convict felon in possession of his property, just as the common law leaves a convict for misdemeanour in possession of his property. It expressly authorises execution against him for costs, and the only way in which he can suffer any restraint as to his property is that he shall not make away with it, and he shall not allow any of such property to be improperly diverted, either away from his creditors or away from his family. That is all. Then there are powers for the Crown to intervene for the protection of the convict and his family. Where a man has a large estate the Crown may interfere and appoint an administrator, but the rights of the creditors are in no way affected by it. An action might have been brought against the convict for this debt, and if an action may be brought, why may not a debtor's summons be brought also? This felon is just as liable to pay as he was before his conviction. Whatever property the creditor can reach he is entitled to reach in the ordinary way by process of law. There is no reason whatever why a felon, where his estate is insolvent, should not be liable to the bankruptcy law like any other person.

LINDLEY, L.J.—I am of the same opinion. I think, as I understand it, the reason for the decision appealed against was, that a felon was precluded by the 8th section from alienating his property, and it was considered that that prohibition extended so far as to prevent him from paying a debt. Parting with his property in payment of a debt is, in one sense, alienating his property. That seems the *ratio decidendi*. Now, just let us look at that a little closer. It would be extremely hard on the felon if that were the true construction of the 8th section, because it would involve this as the consequence, the creditor could sue him. The Act of Parliament does not divest the property from the felon until the administrator is appointed. Judgment could be got against him, a *fi. fa.* could issue upon that judgment, and, if nothing were done, that *fi. fa.* might be executed, and the costs, charges, expenses, possession money, levying fees, &c., would follow. Is it to be said that the felon is to be precluded by this Act of Parliament from saving himself the expenses of that execution, because, forsooth, he cannot pay the amount of the judgment? Is it to be said that, because he cannot alienate his property, or charge it in the way or for the purpose contemplated by the 8th section, he cannot save himself the expense of sheriff's officers? I say it would be a cruel

construction so to hold. And, when you come to look at the other sections which have been alluded to in the course of the argument, and in course of the judgments of Jessel, M.R. and Lush, L.J., it is quite plain to me that the 8th section does not mean that the felon should be prevented by the Legislature from paying his debts. If so, the whole argument falls to the ground. He has left this property, and he has power to pay his just debts. Here is an ordinary debtor's summons requiring payment, and there is no reason why he should not be made a bankrupt if he does not comply with the summons.

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*Woolf.*—The costs here and in the court below will be part of the petitioning creditor's costs.

JESSEL, M.R.—Yes; you cannot make the convict pay them.

Solicitors for the appellants, *Lewis and Lewis*.

Solicitors for the debtor, *Carr, Son, and Thornton*.

## CROWN CASES RESERVED.

*Saturday, Nov. 19, 1881.*

(Before Lord COLERIDGE, C.J., FIELD, HAWKINS, STEPHENS, and CAVE, JJ.)

REG. v. EDWIN MARTIN. (a)

*Malicious injury to person—Malice—Intention—24 & 25 Vict. c. 100, s. 17.*

*The prisoner was the first, or almost the first, to leave the gallery of a theatre at the close of the performance, and ran down the stairs and wilfully put out the gas, and placed an iron bar across the doorway. This caused a panic among the persons when leaving the gallery, and several of them were seriously injured through the pressure of the crowd.*

*Held, that the prisoner was properly convicted of unlawfully and maliciously doing and inflicting grievous bodily harm within the meaning of 24 & 25 Vict. c. 100, s. 17.*

CASE reserved by the Deputy Recorder of Leeds for the opinion of this Court.

At the general quarter sessions for the borough of Leeds, held

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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on the 4th day of July, 1881, Edward Martin was charged before me on an indictment, of which the following is a copy :—

Borough of Leeds, in the county of York.—The jurors for our Lady the Queen, upon their oath present that Edwin Martin, on the thirtieth day of April, in the year of our Lord one thousand eight hundred and eighty-one, in the borough aforesaid, unlawfully and maliciously did inflict grievous bodily harm upon George Pybus, against the form of the statute, &c.

2nd count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Edwin Martin, on the day and year aforesaid, in the borough aforesaid, unlawfully and maliciously did inflict grievous bodily harm upon Martin Dacey, against the form of the statute, &c.

3rd count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Edwin Martin, on the day and year aforesaid, in the borough aforesaid, in and upon the said George Pybus did make an assault, and him the said George Pybus did then beat, wound, and illtreat, thereby then occasioning to the said George Pybus actual bodily harm and other wrongs to the said George Pybus, then did to the great damage of the said George Pybus, against the form of the statute, &c.

4th count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Edwin Martin, on the day and year aforesaid, in the borough aforesaid, in and upon the said Martin Dacey did make an assault, and him, the said Martin Dacey, did then beat, wound, and ill-treat, thereby then occasioning to the said Martin Dacey actual bodily harm and other wrongs to the said Martin Dacey then did, to the great damage of the said Martin Dacey, against the form of the statute, &c.

5th count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Edwin Martin, on the day and in the year aforesaid, unlawfully did set and place, and caused to be set and placed at the foot of and across a certain stairway in the Theatre Royal, in the borough aforesaid, and before the door of the said stairway, a certain trap or engine calculated to inflict grievous bodily harm, to wit, an iron bar or barrier of great strength and substance, the said stairway and door then being deprived of light, with intent that the said bar or barrier, so placed as aforesaid, should inflict grievous bodily harm upon those in the gallery of the said theatre, who then were about to issue therefrom by means of the said stairway and door, and who might come in contact therewith, against the form of the statute, &c.

The first and second counts were framed on the 20th section, the third and fourth counts on the 47th section, and the fifth count on the 31st section of 24 & 25 Vict. c. 100.

The evidence for the prosecution was to the following effect :  
“The gallery in the Theatre Royal at Leeds is reached from the street by a stone staircase, which is lighted by three gaslights, of which one is at the top, one on a landing about the middle, and the third over the door of the pay office, which is at the bottom of the stairs. These lights are all fastened to the walls at the height of seven feet or thereabouts above the stairs or landings. Between the street and the bottom of the staircase there is a pair of folding doors opening outwards into the street. Each of these doors is divided into halves, of which the halves nearest to the door posts or walls on each side can be kept closed by means of strong iron bars let into sockets in the stonework of the staircase and connected with the doors by iron bolts. These bars are movable. The practice was to open only the central halves of the doors whilst the audience were assembling, and passing the pay office so as to limit the number of those who could pass in at the same time, and to remove the iron bars, and open the whole of the doors, some time before the conclusion of the performance, so as to allow the audience to pass out into the street more quickly.”

After the jury had been sworn, and before the case was opened, they were taken under the charge of the chief constable for the borough to view the staircase and the folding doors, with strict directions from me that no person should be permitted to communicate with them during their absence from court.

It was proved that on the night of the 30th day of April, 1881, shortly before the conclusion of the performance, the folding doors were opened to their full extent, and the iron bars placed against the wall of the staircase to the right hand of a person leaving the theatre and close to the door, according to the usual practice.

The evidence showed that the gallery on this night was filled to the extent of about three-fourths of its total capacity.

The defendant (who was well acquainted with the theatre, having assisted on several occasions as a "supernumerary"), was proved to have been in the gallery on this night, and to have been the first, or almost the first, to leave it at the conclusion of the performance.

It was proved that he ran quickly down the gallery staircase, and that as he did so he reached up with his hand and put out the gaslight on the middle landing, and also that over the pay office.

It was also proved that as he passed out into the street he took one of the iron bars which was leaning against the wall close to the door on his right-hand side, and threw it or placed it partly across the doorway. Almost immediately after this had been done by the defendant the whole of the folding doors became closed. The evidence as to how this occurred was extremely vague. The result, however, of the doors being closed and the lower lights extinguished was to leave the lower part of the gallery stairs in almost entire darkness.

Almost immediately after the lights were put out a panic seemed to have seized the audience, who rushed down the stairs and endeavoured to find their way into the street. In consequence of the presence of the iron bar which the defendant had placed or thrown across one part of the doorway, and of the doors being shut, it was some time before any of them could reach the street, and in the meantime the pressure from behind forced those in front against and under the iron bar and against the doors, and a large number of persons were very seriously injured and had to be removed to the infirmary. Amongst those injured were George Pybus and Martin Dacey. The medical evidence was to the effect that George Pybus showed signs of a fracture of the base of the skull, which was probably caused by his slipping and falling backwards as he was running down the stairs, after the gaslights had been extinguished, and so striking his head upon the stairs; and that Martin Dacey was suffering from collapse, the result of partial suffocation, arising from the pressure to which he had been subjected in the crowd or at the foot of the stairs.

One of the witnesses for the prosecution stated that after the defendant had extinguished the gaslight he endeavoured to go up

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the stairs again, but that he was borne back by the crowd of those who were coming down, and it was clearly proved that he was on the stage of the theatre after the accident assisting the injured persons who had been brought there. There was no evidence of any previous quarrel or dispute between him and the managers or officials of the theatre, or between him and any person in the gallery.

The defence set up for the defendant was an *alibi*.

At the conclusion of the case I withdrew the third, fourth, and fifth counts from the consideration of the jury, as I was of opinion that sect. 47 of 24 & 25 Vict. c. 100, on which the third and fourth counts were founded, applied to actual or direct assaults only, and not to such a case as the present, where the assaults (if any) were at the most constructive, and that sect. 31 of the same statute applied only to spring guns, man traps, or other engines of a like nature, and dangerous in themselves, and not to such an instrument as the iron bar which the defendant was alleged to have thrown or placed across the doorway.

In summing up the evidence to the jury as it applied to the first and second counts, I directed them that malice was an essential ingredient in the offence charged against the defendant; and that if they were of opinion that his conduct in extinguishing the gaslights and throwing the iron bar across the door way amounted to nothing more than a piece of foolish mischief, they ought to acquit him, but that if they believed that he did these acts with a deliberate and malicious intention they ought to convict him, and for their guidance I left to them the following questions :

First, did the prisoner extinguish the gaslights, or either of them? Secondly, did he place or throw the bar across the doorway in such a manner as to make the means of exit more difficult? Thirdly, if he did extinguish the lights, or either of them, did he do so as a mere piece of thoughtless mischief, or with the intention of causing terror and alarm in the minds of the persons leaving the gallery? Fourthly, if he did throw or place the bar across the doorway, did he do so as a mere piece of thoughtless mischief, or with the intention of wilfully obstructing the means of exit from the gallery? Fifthly, were Pybus or Dacey, or either of them, injured by reason of any of the acts of the prisoner, and if so by which of them?

After deliberating for some time, the jury found the defendant guilty upon the first and second counts; and in answer to me they stated that they answered the first two questions which I had put to them, and the latter portions of the third and fourth of such questions, in the affirmative, and that they found that both Pybus and Dacey were injured by reason of each of the acts of the defendant mentioned in the first and second questions.

Thereupon a verdict of guilty was entered upon the first and second counts, and of not guilty on the remaining counts of the indictment.

I postponed passing sentence, and admitted the defendant to bail with the view of obtaining the opinion of the Court of Criminal Appeal on the above case.

The questions for the opinion of the Court are: First, was the direction which I gave to the jury right in law? Second, was the defendant properly convicted on the above facts and finding of the jury?

If the Court should be of opinion that the direction was right and that the defendant was properly convicted, the conviction is to stand; if otherwise the conviction is to be quashed.

JOHN E. BARKER,

Recorder of the Borough of Leeds.

No counsel were instructed to argue on either side.

LORD COLERIDGE, C.J.—I confess that I entertain no doubt that the conviction of the prisoner was right, and certainly the prisoner received as favourable treatment as he deserved in the summing up of the learned Recorder who tried the case. His offence, in my opinion, was more serious than it seems to have been considered at the trial. Then as to the question of law raised at the trial. The prisoner was indicted under the 24 & 25 Vict. c. 100, s. 20, which enacts that “Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof shall be liable” to certain specified punishments. The words “with or without any weapon or instrument” are worthy of attention, because those familiar with the old law know that difficulties often arose as to the construction of the word “weapon”; and the words “with or without any weapon or instrument” were introduced to meet those difficulties. Now what the prisoner did in the present case was this: he was the first, or almost the first, to leave the gallery at the conclusion of the performance, he ran down the staircase, put out the gaslights, and as he passed into the street seized one of the iron bars and threw it or placed it across the doorway, and then went his way. This caused a panic among the audience, who rushed down the stairs, and the pressure from the people behind forced those in front against and under the iron bar, and against the doors, and a large number of persons were seriously injured, but happily no one was killed. For that the prisoner was indicted for unlawfully and maliciously inflicting grievous bodily harm, and the jury have found all that was necessary to sustain the charge, and that he did unlawfully and maliciously inflict grievous bodily harm upon the persons named in the indictment without any weapon or instrument in his hand. The question is whether under the circumstances he was guilty within the meaning of the enactment. I am of opinion that he was. The prisoner must be taken to have intended the natural and probable consequences of what he did. And what he did was that which would certainly alarm and frighten a number of persons, and also obstruct their

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exit from the theatre, and cause them to run against the iron bar he placed before the door, and do themselves serious injury. So that if a person was thus injured the prisoner would be guilty of unlawfully and maliciously inflicting upon him grievous bodily harm, maliciously not in the sense of malice against the particular person injured, but in the sense of doing an unlawful act from which another person suffered grievous bodily harm, as in the familiar instance where a person who wantonly fires a rifle down a street and kills another person is in point of law guilty of murder, though he never saw or heard of that person. The same principle is applicable to this case. The prisoner, therefore, in my opinion, was properly convicted.

FIELD, J.—I am of the same opinion.

HAWKINS, J.—I am of the same opinion.

STEPHEN, J.—I am also of the same opinion. It appears to me that the learned Recorder left the questions to the jury much more favourably than in my judgment he ought to have done, for he left it to the jury to say whether the prisoner extinguished the gaslights or placed the iron bar across the doorway as a piece of thoughtless mischief or with the intention of causing terror and alarm, and wilfully obstructing the exit of the persons leaving the gallery. Now, if the prisoner did extinguish the gaslights or place the iron bar across the doorway, and the natural consequence of either act was to cause alarm and terror in the people leaving the theatre, and to lead to their injuring themselves and each other, that comes within the definition of malice. I do not understand what is meant by foolish mischief in such a case; if the prisoner did these acts recklessly he did them wilfully. This ought to be understood, as the word "malicious" is a word capable of being misunderstood. In *Reg. v. Pembleton* (L. Rep. 2 Cr. Cas. Res. 122; 12 Cox C. C. 611), Blackburn, J. said: "We have not now to consider what would be malice aforethought to bring a given case within the common law definition of murder; here the statute says that the act must be unlawful and malicious, and 'malice' may be defined to be 'where any person wilfully does an act injurious to another without lawful excuse.'" This case falls within that definition. The indictment also contained counts for an assault, but they were withdrawn from the jury. I have very great doubt whether they were not maintainable, but it is not necessary to decide that. It is enough to say that upon the whole the conviction was right, and should be affirmed.

CAVE, J.—I am of the same opinion.

*Conviction affirmed.*

## MIDLAND CIRCUIT.

DERBYSHIRE SUMMER ASSIZES, 1881.

(Before Mr. Justice WILLIAMS.)

REG. v. MANSFIELD. (a)

*Evidence—Confession, admissibility of—Appeal for forgiveness—  
Conduct of mistress.*

*The prisoner, while in the custody of a policeman on a charge of arson, said to her mistress: "If you forgive me I will tell you the truth." The mistress answered: "Ann, did you do it?"*

*The prisoner thereupon made a statement.*

*Held, that the statement thus made was inadmissible against the prisoner.*

**A**NNIE MANSFIELD, aged fifteen, a domestic servant, was indicted for having unlawfully, maliciously, and feloniously set fire to a stack of hay, the property of Mrs. Julia Watson.

*Tonman Mosley* appeared for the prosecution.

*Harris* for the defence.

The evidence showed that about six in the evening of Saturday the 19th July, the haystack in question was discovered to be on fire, and that the prisoner was seen to come out of an adjoining yard. On the following Monday the prisoner was apprehended by a police constable, and charged in the presence of her mistress (the daughter of the prosecutrix) with setting fire to the stack. The prisoner then said to her mistress: "If you will forgive me I will tell you the truth," the mistress replied, "Ann, did you do it?" The prisoner then made a statement.

*Harris*, for the defence, objected to the statement being received in evidence, because made in consequence of an inducement held out by a person in authority; and he contended that the prisoner was led to infer, from the reply of her mistress, that she would be forgiven if she told the truth.

*Tonman Mosley*, for the prosecution, contended that no inducement was held out, but that the confession of the prisoner was voluntary, and therefore admissible.

(a) Reported by GILBERT G. KENNEDY, Esq., Barrister-at-Law.

REG.  
v.  
MANSFIELD.  
—  
*Admissibility  
of prisoner's  
confession.*

WILLIAMS, J.—I am of a different opinion, and I hold the statement of the prisoner to be not admissible in evidence. The true principle which renders the confession of a prisoner not receivable in evidence seems to be that if the confession is made either under fear caused by a threat, or in the hope of ultimate forgiveness or gain held out by a person in authority, that then it is not admissible. In the present instance the prisoner, while in the custody of a policeman, makes this appeal to her mistress, who is standing by. If her mistress did not mean to forgive her the girl was under a complete delusion, for by her silence the mistress acquiesced in the prisoner's appeal for forgiveness. The mistress practically invites the prisoner to continue her statement, and she is consequently induced to do so by the expectation that she will be forgiven. It is not because the law is afraid of having truth elicited that these confessions are excluded, but it is because the law is jealous of not having the truth. In my opinion this statement is substantially within the principle of the rule above stated; it would be dangerous to admit it, and I therefore hold it to be inadmissible in evidence.

There being no other evidence against the prisoner she was acquitted.

Solicitor for the prosecution, *Whiston*, of Derby.

Solicitor for the defence, *Hextall*, of Derby.

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# APPENDIX.

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## STATUTES AND PARTS OF STATUTES AFFECTING THE CRIMINAL LAW, PASSED IN THE SESSION OF PARLIAMENT OF 1878.

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### MATRIMONIAL CAUSES ACT, 1878.

41 VICT. c. 19.

*An Act to amend the Matrimonial Causes Act.*—[27th May, 1878.]

4. If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of the statute twenty-fourth and twenty-fifth Victoria, chapter one hundred, section forty-three, upon his wife, the Court or magistrate before whom he shall be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty; and such order may further provide,

If husband convicted of aggravated assault, court may order that wife be not bound to cohabit, &c

- (1.) That the husband shall pay to his wife such weekly sum, as the Court or magistrate may consider to be in accordance with his means and with any means which the wife may have for her support; and the payment of any sum of money so ordered shall be enforceable and enforced against the husband in the same manner as the payment of money is enforced under an order of affiliation; and the Court or magistrate by whom any such order for payment of money shall be made shall have power from time to time to vary the same on the application of either the husband or the wife, upon proof that the means of the husband or wife have been altered in amount since the original order or any subsequent order varying it shall have been made;
- (2.) That the legal custody of any children of the marriage under the age of ten years shall, in the discretion of the Court or magistrate, be given to the wife.

- 41 VICT. c. 19. *Matrimonial Causes Act, 1878.* Provided always, that no order for payment of money by the husband, or for the custody of children by the wife, shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned; and that any order for payment of money or for the custody of children may be discharged by the Court or magistrate by whom such order was made upon proof that the wife has since the making thereof been guilty of adultery; and provided also, that all orders made under this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice.

### TERRITORIAL WATERS JURISDICTION ACT, 1878.

41 & 42 VICT. c. 73.

*An Act to regulate the Law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions.*—[16th August, 1878.]

WHEREAS the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions:

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title. 1. This Act may be cited as "The Territorial Waters Jurisdiction Act, 1878."

Amendment of the law as to the jurisdiction of the Admiral. 2. An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

Restriction on institution of proceedings for punishment of offence. 3. Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.

Provisions as to procedure. 4. On the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the

Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or certificate of the Secretary of State or Governor as is required by this Act has been given, and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of Her Majesty's Principal Secretaries of State as respects the United Kingdom and by the Governor as respects any other part of Her Majesty's dominions, and containing such consent and certificate, shall be sufficient evidence for all the purposes of the Act of the consent and certificate required by this Act.

41 & 42 Vict.  
c. 78.

*Territorial  
Waters Juris-  
diction Act,  
1878.*

Proceedings before a justice of the peace or other magistrate previous to the committal of an offender for trial, or to the determination of the justice or magistrate that the offender is to be put upon his trial, shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this Act.

5. Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

6. This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto; and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.

7. In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings hereinafter assigned to them; that is to say,

"The jurisdiction of the Admiral," as used in this Act, includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdiction as used in any Act of Parliament; and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom, or any other part of Her Majesty's dominions, shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom, or other part of Her Majesty's dominions, to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate, or officer:

Definitions—  
"Jurisdiction of the Admiralty;"  
"United Kingdom;"  
"Territorial waters of Her Majesty's dominions;"  
"Governor;"  
"Offence;"  
"Ship;"  
"Foreign ship."

"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands:

"The territorial waters of Her Majesty's dominions," in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions.



41 & 42 Vict.  
c. 78.

*Territorial  
Waters Juris-  
diction Act,  
1878.*

"Governor," as respects India, means the Governor-General or the Governor of any Presidency; and where a British possession consists of several constituent colonies, means the Governor-General of the whole possession or the Governor of any of the constituent colonies; and as respects any other British possession, means the officer for the time being administering the government of such possession; also any person acting for or in the capacity of Governor shall be included under the term "Governor:"

"Offence" as used in this Act means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force:

"Ship" includes every description of ship, boat, or other floating craft:

"Foreign ship" means any ship which is not a British ship.

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# STATUTES AND PARTS OF STATUTES AFFECTING THE CRIMINAL LAW,

PASSED IN THE SESSION OF PARLIAMENT OF 1879.

## SPRING ASSIZES ACT, 1879.

42 VICT. CAP. 1.

*An Act to amend the Law respecting the holding of Assizes.*—[14th March, 1879.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited as "The Spring Assizes Act, 1879."

Short title.

2. Whereas it is expedient to enable Her Majesty to unite counties for the purpose of holding spring assizes in the manner in which Her Majesty is authorised to unite counties for the purpose of holding winter assizes, and to make similar provision in relation to the jurisdiction of the Central Criminal Court over offences committed in the neighbouring counties to that which Her Majesty is able to make under the Winter Assizes Act, 1876: Be it therefore enacted as follows :

Extension to spring assizes of power of Her Majesty as to winter assizes—39 & 40 Vict. c. 57—40 & 41 Vict. c. 46.

All the provisions of the Winter Assizes Act, 1876, shall be deemed to be herein enacted, with the substitution of "spring assizes" for "winter assizes," and of the months of March, April, and May for the months of November, December, and January respectively; provided that nothing in this Act, or the Winter Assizes Acts, 1876 and 1877, shall affect the custom of holding separate assizes in and for each county twice a year.

3. Notwithstanding anything in the Prison Act, 1877, or anything done in pursuance of that Act, where judgment of death has been passed upon a convict at any assizes held after the passing of this Act, the judgment may be carried into execution in any prison in which the convict was confined for the purpose of safe custody prior to his removal to the place where the assizes were held; and the sheriff of the county for which such assizes were held shall be charged with the execution of that judgment, and shall for that purpose have the same jurisdiction and powers, and be subject to the same duties in the prison in which the judgment is to be carried into execution, although such prison is not situate within his county, as he has by law with respect to the common gaol of his county, or would have had if the Prison Act, 1865, and the Prison Act, 1877, had not passed.

Execution of sentence of death—40 & 41 Vict. c. 21—28 & 29 Vict. c. 126—40 & 41 Vict. c. 21—31 & 32 Vict. c. 24—39 & 40 Vict. c. 57.

The coroner, whose duty it is to hold an inquest on the bodies of prisoners dying in any prison shall hold an inquest in accordance with the Capital Punishment Amendment Act, 1868, on the body of any convict executed in that prison.

42 VICT. c. 1. Nothing in this section shall affect any power authorised to be exercised by Order in Council under the Winter Assizes Act, 1876, and this Act.  
 Spring Assizes Act, 1879.  
 Definitions.

4. In this Act—

The expression “assizes” means any court of assize, or any sessions of oyer and terminer or gaol delivery :

The expression “county” includes a county of a city and a county of a town, and any such division of a county as is constituted by Order in Council under the Act of the session of the third and fourth years of King William the Fourth, chapter seventy-one, intituled “An Act for the appointment of convenient places for the holding of assizes in England and Wales,” and the sheriff for a county so divided shall for the purposes of this Act be deemed to be the sheriff for such division of a county.

## BANKERS' BOOKS EVIDENCE ACT, 1879.

42 VICT. CAP. 11.

*An Act to amend the Law of Evidence with respect to Bankers' Books.*  
 [23rd May, 1879.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Short title. 1. This Act may be cited as “The Bankers' Books Evidence Act, 1879.”

Repeal of 89 & 40 Vict. c. 48. 2. The Bankers' Books Evidence Act, 1876, shall be repealed as from the passing of this Act, but such repeal shall not affect anything which has been done or happened before such repeal takes effect.

Mode of proof of entries in bankers' books. 3. Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded.

Proof that book is a bankers' book. 4. A copy of an entry in a bankers' book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.

Verification of copy. 5. A copy of an entry in a bankers' book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.

Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.

Case in which banker, &c., not compellable to produce book, &c. 6. A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as

a witness to prove the matters, transactions, and accounts therein recorded, 42 Vict. c. 11. unless by order of a judge made for special cause.

7. On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs.

*Bankers' Books Evidence Act, 1879.*

Court or judge may order inspection, &c.

8. The costs of any application to a court or judge under or for the purposes of this Act, and the costs of anything done or to be done under an order of a court or judge made under or for the purposes of this Act shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank, where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceeding.

Costs.

9. In this Act the expressions "bank" and "banker" mean any person, persons, partnership, or company carrying on the business of bankers and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any post office savings bank.

Interpretation of "bank," "banker," and "bankers' books."

The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificate; the fact that any such bank is a post office savings bank may be proved by a certificate purporting to be under the hand of Her Majesty's Postmaster-General or one of the secretaries of the post office.

Expressions in this Act relating to "banker's books" include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank.

10. In this Act—

The expression "legal proceeding" means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

Interpretation of "legal proceeding," "court," "judge."

The expression "the court" means the court, judge, arbitrator, persons, or person before whom a legal proceeding is held or taken;

The expression "a judge" means with respect to England a judge of the High Court of Justice, and with respect to Scotland a lord ordinary of the Outer House of the Court of Session, and with respect to Ireland a judge of the High Court of Justice in Ireland;

The judge of a County Court may, with respect to any action in such court, exercise the powers of a judge under this Act.

11. Sunday, Christmas Day, Good Friday, and any bank holiday shall be excluded from the computation of time under this Act.

Computation of time.

## RACECOURSES LICENSING ACT, 1879.

42 &amp; 43 VICT. CAP. 18.

*An Act for the Licensing of Metropolitan Suburban Racecourses.*—[3rd July, 1879.]

Horse races unlawful within ten miles of London unless licensed.

2. From and after the twenty-fifth day of March one thousand eight hundred and eighty it shall not be lawful that any horse-race be held or take place on any pretext whatsoever within a radius of ten miles from Charing Cross in the City of Westminster, unless in a place for which a licence for horse-racing has been obtained pursuant to the provisions hereinafter contained.

Penalty on persons taking part in unlicensed horse-races.

5. Any person who after the said twenty-fifth day of March one thousand eight hundred and eighty shall take part in any horse-race in any open or inclosed land or place for which a licence is required under this Act, and for which a licence has not been obtained, shall upon summary conviction be liable to a penalty of ten pounds, or an imprisonment not exceeding two months.

Penalty on owners and occupiers of ground where unlicensed horse-races take place.

6. Any person who shall be the owner or lessee or in possession or occupation of any open or inclosed land or place for which a licence for horse-racing is required under this Act, and upon which any horse-race shall be held after the said twenty-fifth day of March one thousand eight hundred and eighty without such licence having been obtained, shall be guilty of a misdemeanour, and on conviction thereof shall be punishable for every such offence with fine or imprisonment at the discretion of the court, such fine not to be less than five pounds nor more than twenty-five pounds, and such imprisonment not to be less than one month nor more than three months.

Unlicensed horse-races to be deemed a nuisance, and liable accordingly.

7. Every horse-race held or taking place in contravention of the provisions of this Act shall be deemed to be a nuisance, and any person injured or inconvenienced thereby shall have all such rights and remedies against all persons taking part in the same, and against owners, lessees, and occupiers of the land or place, as he would have in case of a nuisance at common law.

## PROSECUTION OF OFFENCES ACT, 1879.

42 &amp; 43 VICT. CAP. 22.

*An Act for more effectually providing for the Prosecution of Offences in England, and for other purposes.*—[3rd July, 1879.]

Whereas it is expedient to provide more effectually for the prosecution of offences in England, and for other purposes :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Short title.  
Appointment and duty of Director of

1. This Act may be cited as "The Prosecution of Offences Act, 1879."  
2. A Secretary of State may from time to time appoint an officer to be called the Director of Public Prosecutions, with such salary not exceeding

two thousand pounds per annum, as he may, with the consent of the Treasury, fix. 42 & 43 Vict. c. 22.

It shall be the duty of the Director of Public Prosecutions, under the superintendence of the Attorney-General, to institute, undertake, or carry on such criminal proceedings (whether in the Court for Crown Cases Reserved, before Sessions of Oyer and Terminer or of the Peace, before magistrates, or otherwise), and to give such advice and assistance to chief officers of police, clerks to justices, and other persons, whether officers or not, concerned in any criminal proceeding respecting the conduct of that proceeding, as may be for the time being prescribed by regulations under this Act, or may be directed in a special case by the Attorney-General. *Prosecution of Offences Act, 1879.*  
*Public Prosecutions.*

The regulations under this Act shall provide for the Director of Public Prosecutions taking action in cases which appear to be of importance or difficulty, or in which special circumstances or the refusal or failure of a person to proceed with a prosecution, appear to render the action of such director necessary to secure the due prosecution of an offender, and shall also fix the areas or districts for which the assistants of such director shall respectively be appointed and act.

3. A Secretary of State may from time to time appoint such Assistants, not exceeding six, as may, with the sanction of the Treasury, seem necessary for the proper execution of his duties by the Director of Public Prosecutions, and may assign them their duties. And the Attorney-General, with the approval of a Secretary of State, may from time to time appoint such clerks, messengers, and servants as may, with the sanction of the Treasury, seem necessary for the proper execution of his duties by the Director of Public Prosecutions, and may assign them their duties. *Establishment of office of Director of Public Prosecutions.*

There shall be paid to such Assistants, clerks, messengers, and servants such salaries or remuneration as may be from time to time fixed by the Attorney-General, with the approval of a Secretary of State and the consent of the Treasury.

The said salaries and remuneration, and the salary of the Director of Public Prosecutions, and all expenses incurred in the execution of the duties of that director, shall be paid out of moneys provided by Parliament.

No Assistant director of public prosecutions shall be appointed for any longer term than seven years; but any person vacating his office by reason of this provision may be re-appointed.

4. A person appointed to be the Director of Public Prosecutions, or to be an Assistant of such director, shall be either a barrister-at-law or a solicitor of the Supreme Court of Judicature, and shall be in the case of the director in actual practice and of not less standing than ten years, and in the case of an Assistant in actual practice and of not less standing than seven years. *Qualification of Director of Public Prosecutions and of Assistants.*

Neither the Director of Public Prosecutions nor any Assistant of such director shall directly or indirectly practise in their profession except in the discharge of their duties under this Act.

5. Where the Director of Public Prosecutions gives notice to any justice or coroner that he has instituted, or undertaken, or is carrying on any criminal proceeding, such justice and coroner shall at the time and in the manner prescribed by the regulations under this Act, or directed in any special case by an order of the Attorney-General, transmit to the said director every recognisance, information, certificate, inquisition, deposition, *Delivery of recognisances, inquisitions, &c., to Director of Public Prosecutions.*



42 & 43 Vict.  
c. 22.

*Prosecution of  
Offences Act,  
1879.*

document, and thing which is connected with the said proceeding, and which the justice or coroner is required by law to deliver to the proper officer of the court in which the trial is to be had, and the said director shall, subject to the regulations under this Act, cause the same to be delivered to the said proper officer of the court, and shall be under the same obligation, on the same payment, to deliver to an applicant copies thereof as the said justice, coroner, or officer.

It shall be the duty of every clerk to a justice or to a police court to transmit, in accordance with the regulations under this Act, to the Director of Public Prosecutions, a copy of the information and of all depositions and other documents relating to any case in which a prosecution for an offence instituted before such justice or court is withdrawn or is not proceeded with within a reasonable time.

A failure on the part of any justice or coroner to comply with this section shall be deemed to be a failure to comply with the said requirement to deliver to the proper officer of the court; and any clerk to a justice or to a police court failing to comply with this section shall be liable to the same penalty to which a justice or coroner is liable for such failure as aforesaid,

If Director  
abandon pro-  
secution  
aggrieved  
parties may  
proceed.

6. Where any criminal proceeding has been instituted or undertaken by the Director of Public Prosecutions, any person having the right to institute and carry on such proceedings may, if he have good cause for so doing, show, by affidavit to any judge of the High Court of Justice, that such Director of Public Prosecutions has abandoned such proceedings, or has neglected duly to carry on the same, and such judge, after hearing such Director of Public Prosecutions, may give such directions as to the mode in which such proceedings shall be continued by such person so applying, or by the said Director of Public Prosecutions, as to such judge shall appear right.

Saving as to  
private prose-  
cutors, and  
binding over  
persons to  
prosecute.

7. Nothing in this Act shall interfere with the right of any person to institute, undertake, or carry on any criminal proceeding.

Where any criminal proceeding is instituted, undertaken, or carried on by the Director of Public Prosecutions, such director shall not be bound over to prosecute or conduct such proceeding, or required to give security for costs, and it shall not be necessary to bind over any person to prosecute or conduct such proceeding, and if any person is so bound over, or has given security for costs, he shall, upon the Director of Public Prosecutions undertaking the case, be released from such obligation, and the security shall be deemed to have been cancelled, and the Director of Public Prosecutions shall be liable to costs in lieu of such person.

The prosecution of an offender by the Director of Public Prosecutions shall, for the purpose of enabling a person to obtain a restitution of property, or obtaining, exercising, or enforcing any right, claim, or advantage whatsoever, have the same effect as if such person had been bound over to prosecute and had prosecuted the offender, subject to this proviso, that such person shall give all reasonable information and assistance to the said director in relation to the prosecution.

Regulations  
may be made,  
&c., and to be  
laid before  
Parliament.

8. The Attorney-General, with the approval of the Lord Chancellor and a Secretary of State, may from time to time make, and when made rescind, vary, and add to, regulations for carrying into effect this Act.

The draft of all such regulations proposed to be approved as aforesaid shall be laid before both Houses of Parliament, and shall not be finally approved as aforesaid until the draft has lain before each House of Parliament for not less than forty days upon which such House has sat.

9. In this Act, unless the context otherwise requires, the following terms have the meanings hereinafter respectively assigned to them ; that is to say,

The term "the Treasury" means the Commissioners of Her Majesty's Treasury :

The term "Secretary of State" means one of Her Majesty's Principal Secretaries of State :

The term "person" includes a body of persons corporate or unincorporate.

The term "Attorney-General" means Her Majesty's Attorney-General for England, and Her Majesty's Solicitor-General for England whenever such Solicitor-General can by reason of a vacancy in the office of Attorney-General or otherwise act as the Attorney-General.

10. This Act shall come into operation on the first day of January one thousand eight hundred and eighty, which day is in this Act referred to as the commencement of this Act.

42 & 43 VICT.  
c. 22.

Prosecution of  
Offences Act,  
1879.

Interpretation.

## CHILDREN'S DANGEROUS PERFORMANCES ACT, 1879.

42 & 43 VICT. CAP. 34.

*An Act to regulate the Employment of Children in places of public amusement in certain cases.*—[24th July, 1879.]

Whereas it is expedient to regulate the employment of children in places of public amusement in certain cases.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as "The Children's Dangerous Performances Act, 1879."

2. This Act shall not come into operation until the first day of January one thousand eight hundred and eighty, which date is hereinafter referred to as the commencement of this Act.

3. From and after the commencement of this Act, any person who shall cause any child under the age of fourteen years to take part in any public exhibition or performance whereby, in the opinion of a court of summary jurisdiction, the life or limbs of such child shall be endangered, and the parent or guardian, or any person having the custody, of such child, who shall aid or abet the same, shall severally be guilty of an offence against this Act, and shall on summary conviction be liable for each offence to a penalty not exceeding ten pounds.

Penalty for  
employment of  
any child in  
dangerous  
performances.  
Compensation  
for accident to  
child.

And where in the course of a public exhibition or performance, which in its nature is dangerous to the life or limb of a child under such age as aforesaid taking part therein, any accident causing actual bodily harm occurs to any such child, the employer of such child shall be liable to be indicted as having committed an assault ; and the court before whom such employer is convicted on indictment shall have the power of awarding compensation not exceeding twenty pounds, to be paid by such employer to the child, or to some person named by the court on behalf of the child, for the bodily harm so occasioned ; provided that no person shall be punished twice for the same offence.

42 & 48 Vict.  
c. 84.

*Childrens'  
Dangerous  
Performances  
Act, 1879.*

Evidence of  
age.

Recovery of  
penalties—27  
& 28 Vict. c.  
58—14 & 15  
Vict. c. 93.

4. Whenever any person is charged with an offence against this Act in respect of a child who in the opinion of the court trying the case is apparently of the age alleged by the informant, it shall lie on the person charged to prove that the child is not of that age.

5. Every offence against this Act in respect of which the person committing it is liable as above mentioned to a penalty not exceeding ten pounds shall be prosecuted and the penalty recovered with costs in a summary manner, as follows :

In England, in accordance with the provisions of the Act eleventh and twelfth Victoria, chapter forty-three, intituled "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders," and of any Act or Acts amending the same ; and the court of summary jurisdiction when hearing and determining an information in respect of any offence under this Act shall be constituted either of two or more justices of the peace in petty sessions, sitting at a place appointed for the holding of petty sessions, or some magistrate or officer sitting alone or with others at some court or other place appointed for the administration of justice for the time being empowered by law to do alone any act authorised to be done by more than one justice of the peace ;

In Scotland, in accordance with the provisions of the Summary Procedure Act, 1864, and of any Act or Acts amending the same ; and

In Ireland, within the police district of Dublin metropolis in accordance with the provisions of the Acts regulating the powers and duties of the justices of the peace for such district, or of the police of such district, and elsewhere in Ireland in accordance with the provisions of the Petty Sessions (Ireland) Act, 1851, and any Act amending or affecting the same.

## ELEMENTARY EDUCATION (INDUSTRIAL SCHOOLS) ACT, 1879.

42 & 48 VICT. CAP. 48.

*An Act to amend the Law respecting the Powers of School Boards in relation to Industrial Schools.*—[11th August, 1879.]

33 & 34 Vict.  
c. 75, s. 28—  
36 & 37 Vict.  
c. 86, s. 10,  
and 39 & 40  
Vict. c. 79, s.  
15—29 & 30  
Vict. c. 118, s.  
12—35 & 36  
Vict. c. 21—  
29 & 30 Vict.  
c. 118, s. 12.

Whereas under the Elementary Education Acts, 1870 and 1878, and the Elementary Education Act, 1876, a school board have power, with the consent of one of Her Majesty's Principal Secretaries of State, to establish, build, and maintain industrial schools, and to spread the payment of the expense of such establishment and building over a number of years not exceeding fifty, and to borrow money for that purpose :

And whereas a school board, under the said Acts, have the same power as is given to a prison authority by section twelve of the Industrial Schools Act, 1866, to contribute money towards the alteration, enlargement, or rebuilding of an industrial school, or towards the establishment or building of an industrial school, or towards the purchase of land required for the use or for the site of an industrial school.

And whereas under the Reformatory and Industrial Schools Act Amendment Act, 1822, section twelve of the Industrial Schools Act, 1866, is extended to authorise the prison authority themselves to undertake anything towards which they are authorised by that section to contribute :

And whereas doubts have arisen whether a school board have power to undertake themselves anything towards which they are authorised as above mentioned to contribute or have power to spread the payment of the amount of any such contribution or of the cost of any such undertaking over a number of years, and to borrow money for that purpose, and it is expedient to remove such doubts :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited as "The Elementary Education (Industrial Schools) Act, 1879."

This Act and the Elementary Education Acts, 1870 and 1873, and the Elementary Education Act, 1876, may be cited together as "The Elementary Education Acts, 1870 to 1879."

2. A school board shall have the power themselves to undertake anything towards which they are authorised by the Industrial Schools Act, 1866, as applied by the Elementary Education Acts, 1870 and 1873, and the Elementary Education Act, 1876, or any of them, to contribute, subject nevertheless to the like consent as is required in the case of any such contribution.

3. Where a school board resolve to contribute any sum of money towards, or to undertake the cost of the alteration, enlargement, or rebuilding, but not of the furnishing of an industrial school, or the establishment or building, but not of the furnishing of a school intended to be an industrial school, or the purchase of land required either for the use of an existing industrial school, or for the site of a school intended to be an industrial school, such school board, with the consent of one of Her Majesty's Principal Secretaries of State, shall have the same power of spreading the payment of the sums so contributed, or of the cost of such undertaking, over a number of years, and of borrowing money for that purpose, as they have in the case where they resolve to establish an industrial school; and the provisions of the Elementary Education Acts, 1870 and 1873, and the Elementary Education Act, 1876, and the Public Works Loans Act, 1875, shall apply accordingly.

For the purposes of this Act an industrial school means a certified industrial school and a certified day industrial school.

4. Where a child is ordered upon complaint made by a school attendant committee to be sent to a certified industrial school, the council, guardians, or sanitary authority appointing such committee shall have, on the recommendation of the committee, the same power of contributing toward the maintenance of such child in the said school as if they were a school board, and the contribution by such guardians shall require the like consent as is required under section thirty-one of the Elementary Education Act, 1876, to any other expense incurred by a school attendant committee.

The expenses of any such contribution shall be paid in like manner as the expenses of the school attendance committee, on whose recommendation the contribution is made, are paid in pursuance of the Elementary Education Act, 1876.

42 & 48 Vict.  
c. 48.

Elementary  
Education  
(Industrial  
Schools) Act,  
1879.

Short title—  
88 & 84 Vict.  
c. 75—86 & 87  
Vict. c. 86—  
89 & 40 Vict.  
c. 79.

Extension to  
School Board  
of 29 & 80  
Vict. c. 118—  
88 & 84 Vict.  
c. 75—86 & 87  
Vict. c. 86—  
89 & 40 Vict.  
c. 75.

Power of  
school board  
to borrow for  
contribution  
towards or  
undertaking  
cost of enlarg-  
ing, &c., an  
industrial  
school—88 &  
84 Vict. c. 75  
—86 & 87  
Vict. c. 86—  
89 & 40 Vict.  
c. 79—88 & 89  
Vict. c. 89.

Power of guar-  
dians to con-  
tribute to  
maintenance  
of child in  
industrial  
school—89 &  
40 Vict. c. 79,  
s. 81—89 & 40  
Vict. c. 79.

SUMMARY JURISDICTION ACT, 1879.

42 & 43 VICT. CAP. 49.

*An Act to Amend the Law relating to the Summary Jurisdiction of Magistrates.*—[11th August, 1879.]

PART I.—COURT OF SUMMARY JURISDICTION.

Mitigation of punishment by court.

4. Subject as in this Act mentioned, and notwithstanding any enactment to the contrary, where a court of summary jurisdiction has authority under this Act, or under any other Act, whether past or future, to impose imprisonment or to impose a fine for an offence punishable on summary conviction, that court may, in the case of imprisonment, impose the same without hard labour, and reduce the prescribed period thereof, or do either of such acts; and in the case of a fine, if it be imposed as in respect of a first offence, may reduce the prescribed amount thereof.

And where in the case either of imprisonment or a fine there is prescribed a requirement for the offender to enter into his recognizance and to find sureties for keeping the peace, and observing some other condition, or to do any of such things, the court may dispense with any such requirement, or any part thereof.

And where a court of summary jurisdiction has authority under an Act of Parliament other than this Act, whether past or future, to impose imprisonment for an offence punishable on summary conviction, and has not authority to impose a fine for that offence, that court, when adjudicating on such offence, may, notwithstanding, if the court think that the justice of the case will be better met by a fine than by imprisonment, impose a fine not exceeding twenty-five pounds, and not being of such an amount as will subject the offender, under the provisions of this Act, in default of payment of the fine, to any greater term of imprisonment than that to which he is liable under the Act authorising the said imprisonment.

Scale of imprisonment for nonpayment of money.

5. The period of imprisonment imposed by a court of summary jurisdiction under this Act, or under any other Act, whether past or future, in respect of the nonpayment of any sum of money adjudged to be paid by a conviction, or in respect of the default of a sufficient distress to satisfy any such sum, shall, notwithstanding any enactment to the contrary in any past Act, be such period as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any case the maximum fixed by the following scale; that is to say,

Where the amount of the sum or sums of money adjudged to be paid by a conviction as ascertained by the conviction	The said period shall not exceed
Does not exceed ten shillings .....	Seven days.
Exceeds ten shillings but does not exceed one pound ...	Fourteen days.
Exceeds one pound but does not exceed five pounds.....	One month.
Exceeds five pounds but does not exceed twenty pounds .....	Two months.
Exceeds twenty pounds.....	Three months.

And such imprisonment shall be without hard labour, except where hard labour is authorised by the Act on which the conviction is founded, in which case the imprisonment may, if the court thinks the justice of the case requires it, be with hard labour, so that the term of hard labour awarded do not exceed the term authorised by the said Act.



7. *Payment by instalments of or security taken for payment of money.* 42 & 43 Vict. c. 49.

8. Where a fine adjudged by a conviction by a court of summary jurisdiction to be paid does not exceed five shillings, then, except so far as the court may think fit to expressly order otherwise, an order shall not be made for payment by the defendant to the informant of any costs; and the court shall, except so far as they think fit to expressly order otherwise, direct all fees payable or paid by the informant to be remitted or repaid to him; the court may also order the fine, or any part thereof, to be paid to the informant in or towards the payment of his costs,

Summary  
Jurisdiction  
Act, 1879.

Provision as to  
costs in the  
case of small  
fines.

9. *Enforcing recognizances by court of summary jurisdiction.*

10. (1) Where a child is charged before a court of summary jurisdiction with any indictable offence other than homicide, the court, if they think it expedient so to do, and if the parent or guardian of the child so charged when informed by the court of his right to have the child tried by a jury, does not object to the child being dealt with summarily, may deal summarily with the offence, and inflict the same description of punishment as might have been inflicted had the case been tried on indictment.

Summary trial  
of children for  
indictable  
offences,  
unless objected  
to by parent or  
guardian.

Provided that—

(a.) A sentence of penal servitude shall not be passed, but imprisonment shall be substituted therefor; and

(b.) Where imprisonment is awarded, the term shall not in any case exceed one month; and

(c.) Where a fine is awarded, the amount shall not in any case exceed forty shillings; and

(d.) When the child is a male the court may, either in addition to, or instead of any other punishment, adjudge the child to be, as soon as practicable, privately whipped with not more than six strokes of a birch rod by a constable, in the presence of an inspector, or other officer of police of higher rank than a constable, and also in the presence, if he desires to be present, of the parent or guardian of the child.

(2.) For the purpose of a proceeding under this section, the court of summary jurisdiction, at any time during the hearing of the case at which they become satisfied by the evidence that it is expedient to deal with the case summarily, shall cause the charge to be reduced into writing, and read to the parent or guardian of the child, and then address a question to such parent or guardian to the following effect: "Do you desire the child to be tried by a jury, and object to the case being dealt with summarily?" with a statement, if the court think such statement desirable for the information of such parent or guardian, of the meaning of the case being dealt with summarily, and of the assizes or sessions (as the case may be) at which the child will be tried if tried by a jury.

(3.) Where the parent or guardian of a child is not present when the child is charged with an indictable offence before a court of summary jurisdiction, the court may, if they think it just so to do, remand the child for the purpose of causing notice to be served on such parent or guardian, with a view so far as is practicable of securing his attendance at the hearing of the charge, or the court may, if they think it expedient so to do, deal with the case summarily.

(4.) This section shall not prejudice the right of a court of summary jurisdiction to send a child to a reformatory or industrial school.

(5.) This section shall not render punishable for an offence any child



42 & 43 VICT. c. 49. who is not, in the opinion of the court before whom he is charged, above the age of seven years, and of sufficient capacity to commit crime.

*Summary  
Jurisdiction  
Act, 1869.*

Summary trial  
with consent  
of young per-  
sons (juvenile  
offenders).

11. (1.) Where a young person is charged before a court of summary jurisdiction with any indictable offence specified in the first column of the First Schedule to this Act, the court, if they think it expedient so to do, having regard to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case, and if the young person charged with the offence, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily, may deal summarily with the offence, and in their discretion adjudge such person if found guilty of the offence, either to pay a fine not exceeding ten pounds, or to be imprisoned with or without hard labour, for any term not exceeding three months; and if the young person is a male, and, in the opinion of the court, under the age of fourteen years, the court, if they think it expedient so to do, may, either in substitution for or in addition to any other punishment under this Act, adjudge such young person to be, as soon as practicable, privately whipped with not more than twelve strokes of a birch rod by a constable, in the presence of an inspector or other officer of police of higher rank than a constable, and also in the presence, if he desires to be present, of the parent or guardian of such young person.

(2.) For the purpose of a proceeding under this section, the court, at any time during the hearing of the case at which they become satisfied by the evidence that it is expedient to deal with the case summarily, shall cause the charge to be reduced into writing and read to the young person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?" with a statement, if the court think such statement desirable for the information of the young person to whom the question is addressed, of the meaning of the case being dealt with summarily, and of the assizes or sessions (as the case may be) at which he will be tried if tried by a jury.

(3.) This section shall not prejudice the right of a court of summary jurisdiction to send a young person to a reformatory or an industrial school.

Summary trial  
with consent  
of adult.

12. Where a person who is an adult is charged before a court of summary jurisdiction with an indictable offence specified in the second column of the First Schedule to this Act, the court, if they think it expedient so to do, having regard to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case, and if the person charged with the offence, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily, may deal summarily with the offence, and adjudge such person, if found guilty of the offence, to be imprisoned, with or without hard labour, for any term not exceeding three months, or to pay a fine not exceeding twenty pounds.

For the purpose of a proceeding under this section, the court, at any time during the hearing of the case at which they become satisfied by the evidence that it is expedient to deal with the case summarily, shall cause the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?" with a statement, if the court think such statement desirable for the information of the person to whom the question is

addressed, of the meaning of the case being dealt with summarily, and of the assizes or sessions (as the case may be) at which he will be tried if tried by a jury. 42 & 48 Vict. c. 49.

13. (1.) Where a person who is an adult is charged before a court of summary jurisdiction with an indictable offence which is specified in the first column of the First Schedule to this Act, and is not comprised in the second column of that schedule, and the court at any time during the hearing of the case become satisfied that the evidence is sufficient to put the person charged on his trial for the said offence, and further are satisfied (either after such a remand as is provided by this Act or otherwise) that the case is one which, having regard to the character and antecedents of the person charged, the nature of the offence, and all the circumstances of the case, may properly be dealt with summarily, and may be adequately punished by virtue of the powers of this Act, then the court shall cause the charge to be reduced into writing and read to the person charged, and shall then ask him whether he is guilty or not of the charge; and if such person says that he is guilty, the court shall thereupon cause a plea of guilty to be entered, and adjudge him to be imprisoned with or without hard labour, for any term not exceeding six months.

*Summary  
Jurisdiction,  
Act, 1879.*

Summary con-  
viction on plea  
of guilty of  
adult.

(2.) The court, before asking, in pursuance of this section, the person charged whether he is guilty or not, shall explain to him that he is not obliged to plead or answer, and that if he pleads guilty he will be dealt with summarily, and that if he does not plead or answer, or plead not guilty, he will be dealt with in the usual course, with a statement, if the court thinks such statement desirable for the information of the person to whom the question is addressed, of the meaning of the case being dealt with summarily or in the usual course, and of the assizes or sessions (as the case may be) at which such person will be tried if tried by a jury. The court shall further state to such person to the effect that he is not obliged to say anything unless he desires to do so, but that whatever he says will be taken down in writing, and may be given in evidence against him upon his trial, and shall give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been held out to him to induce him to make any admission or confession of his guilt, but that whatever he then says may be given in evidence against him upon his trial, notwithstanding such promise or threat.

(3.) If the prisoner does not plead guilty, whatever he says in answer shall be taken down in writing and read over to him, and signed by a justice constituting or forming part of the court, and kept with the depositions of the witnesses, and transmitted with them in manner required by law, and afterwards upon the trial of the prisoner may, if necessary, be given in evidence against him without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact sign the same.

14. Where a person who is an adult is charged before a court of summary jurisdiction with any indictable offence specified in the First Schedule to this Act, and it appears to the court that the offence is one which, owing to a previous conviction on indictment of the person so charged, is punishable by law with penal servitude, the court shall not deal with the case summarily in pursuance of this Act.

Restriction on  
summary  
dealing with  
adult charged  
so with indict-  
able offence.

15. A child on summary conviction for an offence punishable on summary conviction under this Act, or under any other Act, whether past punishment of

42 & 48 Vict. or future, shall not be imprisoned for a longer period than one month nor  
c. 49. fined a larger sum than forty shillings.

*Summary  
Jurisdiction  
Act, 1879.*

child for sum-  
mary offence.  
Power of court  
to discharge  
accused with-  
out punish-  
ment.

16. If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future, the court of summary jurisdiction think that though the charge is proved, the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment,—

(1.) The court, without proceeding to conviction, may dismiss the information, and, if the court think fit, may order the person charged to pay such damages, not exceeding forty shillings, and such costs of the proceeding, or either of them, as the court think reasonable; or,

(2.) The court, upon convicting the person charged may discharge him conditionally on his giving security, with or without sureties, to appear for sentence when called upon, or to be of good behaviour, and either without payment of damages and costs, or subject to the payment of such damages and costs, or either of them, as the court think reasonable :

Provided that this section shall not apply to an adult convicted in pursuance of this Act of an offence of which he has pleaded guilty, and of which he could not, if he had not pleaded guilty, be convicted by a court of summary jurisdiction.

Right to claim  
trial by jury in  
case of offences  
otherwise  
triable sum-  
marily.

17. (1.) A person when charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, on appearing before the court and before the charge is gone into but not afterwards, claim to be tried by a jury; and thereupon the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, and the offence shall as respects the person so charged be deemed to be an indictable offence; and, if the person so charged is committed for trial, or bailed to appear for trial, shall be prosecuted accordingly, and the expenses of the prosecution shall be payable as in cases of felony.

(2.) A court of summary jurisdiction, before the charge is gone into in respect of an offence to which this section applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall address him to the following effect: "You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury; do you desire to be tried by a jury?" with a statement, if the court think such statement desirable for the information of the person to whom the question is addressed of the meaning of being dealt with summarily, and of the assizes or sessions (as the case may be) at which such person will be tried by a jury.

(3.) This section shall not apply to the case of a child unless the parent or guardian of the child is present; but the court shall ascertain whether the parent or guardian of the child is present, and if he is, shall address the above question to such parent or guardian, and the claim under this section may be made by such parent or guardian.

Imprisonment  
in cases of  
cumulative  
sentences not

18. A court of summary jurisdiction shall not, by cumulative sentences of imprisonment (other than for default of finding sureties) to take effect in succession in respect of several assaults committed on the same occa-

sion, impose on any person imprisonment for the whole exceeding six months. 42 & 43 Vict. c. 49.

19. Where, in pursuance of any Act, whether past or future, any person is adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine, either as a punishment for an offence, or, save as hereinafter mentioned, for failing to do or to abstain from doing any act or thing required to be done or left undone, and such person is not otherwise authorised to appeal to a court of general or quarter sessions, and did not plead guilty, or admit the truth of the information or complaint, he may, notwithstanding anything in the said Act, appeal to a court of general or quarter sessions against such conviction or order: *Summary Jurisdiction Act, 1879.* to exceed six months. Appeal from summary conviction to general or quarter sessions.

Provided that this section shall not apply where the imprisonment is adjudged for failure to comply with an order for the payment of money, for the finding of sureties, for the entering into any recognizance, or for the giving of any security.

20. Court of summary jurisdiction to sit at a petty sessional or occasional court-house, &c. (11 & 12 Vict. c. 43).

21. Special provisions as to warrants of commitment for non-payment of sums of money, and as to warrants of distress.

#### *Supplemental Provisions.*

22. (1.) The clerk of every court of summary jurisdiction shall keep a register of the minutes or memorandums of all the convictions and orders of such court, and of such other proceedings as are directed by a rule under this Act to be registered, and shall keep the same with such particulars and in such form as may be from time to time directed by a rule under this Act. *Register of court of summary jurisdiction.*

(2.) Such register, and also any extract from such register certified by the clerk of the court keeping the same to be a true extract, shall be *prima facie* evidence of the matters entered therein for the purpose of informing a court of summary jurisdiction acting for the same county, borough, or place as the court whose convictions, orders, and proceedings are entered in the register; but nothing in this section shall dispense with the legal proof of a previous conviction for an offence when required to be proved against a person charged with another offence.

(3.) The register kept by any particular clerk, in pursuance of this section, may be distinguished by the name of his petty sessional division, or by such name or description as may be directed by a rule under this Act.

(4.) The entries relating to each minute, memorandum, or proceeding shall be either entered or signed by the justice or one of the justices constituting the court, by or before whom the conviction or order or proceeding referred to in the minute or memorandum was made or had; except that when a court of summary jurisdiction is not a petty sessional court a return signed as aforesaid, and made and entered in the register in manner provided by a rule under this Act, shall suffice.

(5.) Every sum paid to the clerk of a court of summary jurisdiction in accordance with the Summary Jurisdiction Acts, and the appropriation of such sum, shall be entered and authenticated in such manner as may be from time to time directed by a rule under this Act.

(6.) Every such register shall be open for inspection, without fee or reward, by any justice of the peace, or by any person authorised in that behalf by a justice of the peace or by a Secretary of State.

12 & 43 Vict.  
c. 49.

*Summary  
Jurisdiction  
Act, 1879.*

Regulations as  
to securities  
taken in  
pursuance of  
Act.

23. (1.) A person shall give security under this Act, whether as principal or surety, either by the deposit of money with the clerk of the court, or by an oral or written acknowledgment of the undertaking or condition by which and of the sum for which he is bound, in such manner and form as may be for the time being directed by any rule made in pursuance of this Act, and evidence of such security may be provided by entry thereof in the register under this Act of proceedings of a court of summary jurisdiction or otherwise as may be directed by such rule.

(2.) Any sum which may become due in pursuance of a security under this Act from a surety shall be recoverable summarily, in manner directed by this Act with respect to a civil debt, on complaint by a constable or by the clerk of the court directing such security to be given, or by some other person authorised for the purpose by that court or any other court of summary jurisdiction for the same county, borough, or place.

(3.) A court of summary jurisdiction may enforce payment of any sum due by a principal in pursuance of a security under this Act which appears to such court to be forfeited, in like manner as if that sum were adjudged by a court of summary jurisdiction to be paid as a fine which the statute provides no mode of enforcing, if the security was given for a sum adjudged by a conviction, and in any other case in like manner as if it were a sum adjudged by a court of summary jurisdiction to be paid as a civil debt; provided that before a warrant of distress for the sum is issued, such notice of the forfeiture shall be served on the said principal, and in such manner as may be directed for the time being by rules under this Act, and subject thereto by the court authorising the security or by any court to whom application is made for the issue of the warrant.

(4.) Any sum paid by a surety on behalf of his principal in respect of a security under this Act, together with all costs, charges, and expenses incurred by such surety in respect of that security, shall be deemed a civil debt due to him from the principal, and may be recovered before a court of summary jurisdiction in manner directed by this Act with respect to the recovery of a civil debt which is recoverable summarily.

(5.) Where security is given under this Act for payment of a sum of money, the payment of such sum shall be enforced by means of such security in substitution for other means of enforcing such payment.

Power of court  
of summary  
jurisdiction to  
remand for  
indictable  
offence.

24. (1.) Where a person is charged before a court of summary jurisdiction with an indictable offence, with which a court of summary jurisdiction has or may have under the circumstances in this Act mentioned power to deal summarily, the court before whom such person is charged, without prejudice to any other power that it may possess,—

(a.) may, for the purpose of ascertaining whether it is expedient to deal with the case summarily, either before or during the hearing of the case, from time to time adjourn the case and remand the person accused; and

(b.) if such court is not at the time of the charge a petty sessional court, and the court think the case proper to be dealt with summarily, may adjourn the case and remand the person accused until the next practical sitting of a petty sessional court.

(2.) A person may be remanded under this section in like manner in all respects as a person accused of an indictable offence may be remanded under section twenty-one of the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-two, intituled, "An Act to facilitate the performance of the duties of justices



of the peace out of sessions within England and Wales with respect to persons charged with indictable offences," with this addition, that where he is remanded to the next practicable sitting of a petty sessional court he may be remanded for more than eight days.

25. The power of a court of summary jurisdiction, upon complaint of any person, to adjudge a person to enter into a recognisance and find sureties to keep the peace or to be of good behaviour towards such first-mentioned person, shall be exercised by an order upon complaint, and the Summary Jurisdiction Acts shall apply accordingly, and the complainant and defendant and witnesses may be called and examined and cross-examined, and the complainant and defendant shall be subject to costs, as in the case of any other complaint.

The court may order the defendant, in default of compliance with the order, to be imprisoned for a period not exceeding, if the court be a petty sessional court, six months, and if the court be a court of summary jurisdiction other than a petty sessional court, fourteen days.

26. Where a person has been committed to prison by a court of summary jurisdiction for default in finding sureties, any petty sessional court for the same county, borough, or place may, on application made to them in manner directed by a rule made in pursuance of this Act, by him or by some one acting on his behalf, inquire into the case of the person so committed; and if upon new evidence produced to such court or proof of a change of circumstances the court think, having regard to all the circumstances of the case, that it is just so to do, they may reduce the amount for which it is proposed the sureties or surety should be bound, or dispense with the sureties or surety, or otherwise deal with the case as the court may think just.

27. Where an indictable offence is under the circumstances in this Act mentioned authorised to be dealt with summarily,—

- (1.) The procedure shall, until the court assume the power to deal with such offence summarily, be the same in all respects as if the offence were to be dealt with throughout as an indictable offence; but when and so soon as the court assume the power to deal with such offence summarily, the procedure shall be the same from and after that period as if the offence were an offence punishable on summary conviction and not on indictment, and the provisions of the Acts relating to offences punishable on summary conviction shall apply accordingly; and
- (2.) The evidence of any witness taken before the court assumed the said power need not be taken again; but every such witness shall, if the defendant so require it, be recalled for the purpose of cross-examination; and
- (3.) The conviction for any such offence shall be of the same effect as a conviction for the offence on indictment, and the court may make the like order for the restitution of property as might have been made by the court before whom the person convicted would have been tried if he had been tried on indictment; and
- (4.) Where the court have assumed the power to deal with the case summarily, and dismiss the information, they shall, if required, deliver to the person charged a copy certified under their hands of the order of such dismissal, and such dismissal shall be of the same effect as an acquittal on a trial on indictment for the offence; and
- (5.) The conviction shall contain a statement either as to the plea of

42 & 43 Vict.  
c. 49.

Summary  
Jurisdiction  
Act, 1879.

Procedure  
before court of  
summary  
jurisdiction in  
case of sureties  
to keep the  
peace.

Power of petty  
sessional court  
with respect to  
varying order  
for sureties.

Regulations as  
to indictable  
offences dealt  
with sum-  
marily.



42 & 43 Vict.  
c. 49.

*Summary  
Jurisdiction  
Act, 1879.*

guilty of an adult, or in the case of a child as to the consent or otherwise of his parent or guardian, and in the case of any other person of the consent of such person, to be tried by a court of summary jurisdiction; and

- (6.) The order of dismissal shall be transmitted to and filed by the clerk of the peace in like manner as the conviction is required by the Summary Jurisdiction Act, 1848, to be transmitted and filed, and together with the order of dismissal or the conviction, as the case may be, there shall be transmitted to and filed by such clerk in each case the written charge, the depositions of the witnesses, and the statement, if any, of the accused.

Cost of prosecution of indictable offences dealt with summarily.

28. Where an indictable offence (the expenses of the prosecution of which would otherwise have been payable out of the local rate) is dealt with summarily in pursuance of this Act by a court of summary jurisdiction, the expenses of the prosecution of such offence shall be payable in manner provided by this section.

The court dealing summarily with any such indictable offence may, if it seem fit, grant to any person who preferred the charge, or appeared to prosecute or give evidence, a certificate of the amount of the compensation which the court may deem reasonable for his expenses, trouble, and loss of time therein, subject, nevertheless, to such regulations as may be from time to time made by a Secretary of State with respect to the payment of costs in the case of indictable offences; and the amount named in the certificate may include the fees payable to the clerk of the court of summary jurisdiction, and the fees payable to the clerk of the peace for filing the convictions, depositions, and other documents required to be filed by him under this Act, and such other expenses as are by law payable when incurred before a commitment for trial; and every certificate so granted shall have the effect of an order of court for the payment of the expenses of a prosecution for felony, made in pursuance of the Act of the seventh year of King George the Fourth, chapter sixty-four, intituled "An Act for improving the administration of criminal justice in England," and the Acts amending the same; and the amount named in such certificate shall be paid in like manner as the expenses specified in such order would have been paid.

Power of the Lord Chancellor to make rules.

—11 & 12  
Vict. c. 48.

29. (1.) The Lord High Chancellor of Great Britain may from time to time make, and when made, rescind, alter, and add to, rules in relation to the following matters, or any of them; that is to say,

- (a.) The giving security under this Act; and
- (b.) The forms to be used under the Summary Jurisdiction Acts, or any of them, including the forms of any recognisance mentioned in this Act; and
- (c.) The costs and charges payable under distress warrants issued by a court of summary jurisdiction; and
- (d.) Adapting to the provisions of this Act and of the Summary Jurisdiction Act, 1848, the procedure before courts of summary jurisdiction under any Act passed before the Summary Jurisdiction Act, 1848; and
- (e.) Regulating the form of the account to be rendered by clerks of courts of summary jurisdiction of fines, fees, and other sums received by them, and providing for the discontinuance of any existing account rendered unnecessary by the aforesaid account; and
- (f.) Any other matter in relation to which rules are authorised or

required to be made under or for the purpose of carrying into effect this Act. 42 & 48 Vict. c. 49.

(2.) The Lord Chancellor may, in the exercise of the power given him by this section, annul, alter, or add to any forms contained in the Summary Jurisdiction Act, 1848, or any forms relating to summary proceedings contained in any other Act.

*Summary  
Jurisdiction  
Act, 1879.*

(3.) Any rule purporting to be made in pursuance of this section shall be laid before both Houses of Parliament as soon as may be after it is made, if Parliament be then sitting, or if not then sitting, within one month after the commencement of the then next session of Parliament, and shall be judicially noticed.

80. Power to provide petty sessional court-house.

## PART II.—AMENDMENT OF PROCEDURE.

82. Application of provisions respecting appeals to quarter sessions to appeals under prior Acts.

83. (1.) Any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated. Appeal from court of summary jurisdiction by special case—88 & 39 Vict. c. 77.

(2.) The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act, and the case shall be heard and determined in manner prescribed by rules of court made in pursuance of the Supreme Court of Judicature Act, 1875, and the Acts amending the same; and, subject as aforesaid, the Act of the session of the twentieth and twenty-first year of the reign of Her present Majesty, chapter forty-three, intituled “An Act to improve the administration of the law so far as respects summary proceedings before justices of the peace,” shall, so far as it is applicable, apply to any special case stated under this section as if it were stated under that Act.

Provided that nothing in this section shall prejudice the statement of any special case under that Act.

84. (1.) Where a power is given by any future Act to a court of summary jurisdiction of requiring any person to do or abstain from doing any act or thing other than the payment of money, or of requiring any act or thing to be done or left undone other than the payment of money, and no mode is prescribed of enforcing such requisition, the court may exercise such power by an order or orders, and may annex to any such order any conditions as to time or mode of action which the court may think just, and may suspend or rescind any such order on such undertaking being given or condition being performed as the court may think just, and generally may make such arrangement for carrying into effect such power as to the court seems meet. Summary orders.

(2.) A person making default in complying with an order of a court of summary jurisdiction in relation to any matter arising under any future Act other than the payment of money, shall be punished in the prescribed manner, or if no punishment is prescribed, may in the discretion of the court be ordered to pay a sum (to be enforced as a civil debt recoverable summarily under this Act) not exceeding one pound for

42 & 43 Vict. c. 49. every day during which he is in default, or to be imprisoned until he has remedied his default :

*Summary  
Jurisdiction  
Act, 1879.*

Provided that a person shall not, for non-compliance with the requisition of a court of summary jurisdiction, whether made by one or more orders, to do or abstain from doing any act or thing, be liable under this section to imprisonment for a period or periods amounting in the aggregate to more than two months, or to the payment of any sums exceeding in the aggregate twenty pounds.

35. Recovery of civil debts in court of summary jurisdiction—32 & 33 Vict. c. 62—38 & 39 Vict. c. 90.

Summons of witness when out of the jurisdiction of a court of summary jurisdiction — 11 & 12 Vict. c. 43.

36. Where a court of summary jurisdiction for any county, borough, or place, would have power to issue a summons to a witness, if such witness were within the said county, borough, or place, and such witness is believed to be within some other county, borough, or place in England, such court may issue a summons to such witness in like manner as if such witness were within the jurisdiction of such court; and any court of summary jurisdiction for the county, borough, or place in which the witness may be, or be believed to be, may, on proof on oath, or such solemn declaration as provided by this Act, of the signature to the summons, indorse the summons, and the witness, on service of the summons so indorsed and on payment or tender of a reasonable amount for his expenses, shall obey the summons, and in default shall be liable to be apprehended or otherwise proceeded against either in the county, borough, or place, in which the summons was issued, or in that in which the witness may happen to be, in manner directed by the Summary Jurisdiction Act, 1848, as if such witness had been duly summoned by a court of summary jurisdiction for the county, borough, or place in which such witness is apprehended or proceeded against.

Summons or warrant not avoided by death of justice, &c.— 11 & 12 Vict. c. 48.

37. A warrant or summons issued by a justice of the peace under the Summary Jurisdiction Act, 1848, or any other Act, whether past or future, or otherwise, shall not be avoided by reason of the justice who signed the same dying or ceasing to hold office.

Bail of person arrested without a warrant.

38. A person taken into custody for an offence without a warrant shall be brought before a court of summary jurisdiction as soon as practicable after he is so taken into custody, and if it is not or will not be practicable to bring him before a court of summary jurisdiction within twenty-four hours after he is so taken into custody, a superintendent or inspector of police or other officer of police of equal or superior rank, or in charge of any police station, shall inquire into the case, and, except where the offence appears to such superintendent, inspector, or officer to be of a serious nature, shall discharge the prisoner, upon his entering into a recognisance, with or without sureties, for a reasonable amount, to appear before some court of summary jurisdiction at the day, time, and place named in the recognisance.

Provisions as to proceedings, &c.

39. The following enactments shall apply to proceedings before courts of summary jurisdiction; (that is to say,)

1. The description of any offence in the words of the Act, or any order, byelaw, regulation, or other document creating the offence, or in similar words, shall be sufficient in law; and
2. Any exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, byelaw, regulation, or other document creating the offence, may be proved by the defendant but need not be specified or negatived in the information or complaint; and, if

so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant; and

3. A warrant of commitment shall not be held void by reason of any defect therein, if it be therein alleged that the offender has been convicted or ordered do or to abstain from doing any act or thing required to be done or left undone, and there is a good and valid conviction or order to sustain the same; and

4. A warrant of distress shall not be deemed void by reason only of any defect therein, if it be therein alleged that any conviction or order has been made, and there is a good and valid conviction or order to sustain the same, and a person acting under a warrant of distress shall not be deemed a trespasser from the beginning by reason only of any defect in the warrant, or of any irregularity in the execution of the warrant, but this enactment shall not prejudice the right of any person to satisfaction for any special damage caused by any defect in or irregularity in the execution of a warrant of distress, so however that if amends are tendered before action brought, and if the action is brought are paid into court in the action, and the plaintiff does not recover more than the sum so tendered and paid into court, the plaintiff shall not be entitled to any costs incurred after such tender, and the defendant shall be entitled to costs, to be taxed as between solicitor and client; and

5. All forfeitures not pecuniary which are incurred in respect of an offence triable by a court of summary jurisdiction, or which may be enforced by a court of summary jurisdiction, may be sold or disposed of in such manner as the court having cognisance of the case or any other court of summary jurisdiction for the same county, borough, or place may direct, and the proceeds of such sale shall be applied in the like manner as if the proceeds were a fine imposed under the Act on which the proceeding for the forfeiture is founded.

41. In a proceeding within the jurisdiction of a court of summary jurisdiction, without prejudice to any other mode of proof, service on a person of any summons, notice, process, or document, required or authorised to be served, and the handwriting and seal of any justice of the peace, or other officer or person, on any warrant, summons, notice, process, or document, may be proved by a solemn declaration taken before a justice of the peace, or before a commissioner to administer oaths in the Supreme Court of Judicature, or before a clerk of the peace or a registrar of a County Court; and any declaration purporting to be so taken shall, until the contrary is shown, be sufficient proof of the statements contained therein, and shall be received in evidence in any court or legal proceeding, without proof of the signature or of the official character of the person or persons taking or signing the same; and the fee, if any, for taking such declaration shall be such sum, not exceeding one shilling, as may be directed by rules made in pursuance of this Act, and any such fee shall be costs in the matter or proceeding to which it relates.

The declaration may be in the form provided by a rule under this Act, and, if any declaration made under this section is untrue in any material particular, the person wilfully making such false declaration shall be guilty of wilful and corrupt perjury.

42 & 43 Vict.  
c. 49.

Summary  
Jurisdiction  
Act, 1879.

Proof by  
declaration of  
service of pro-  
cess, hand-  
writing, &c.

42 & 43 Vict.  
c. 49.

*Summary  
Jurisdiction  
Act, 1879.*

Recognisances  
taken out of  
court.

42. When a court of summary jurisdiction has fixed, as respects any recognisance, the amount in which the principal and the sureties (if any) are to be bound, the recognisance, notwithstanding anything in this or any other Act, need not be entered into before such court, but may, subject to any rules made in pursuance of this Act, be entered into by the parties before any other court of summary jurisdiction, or before any clerk of a court of summary jurisdiction, or before a superintendent or inspector of police, or other officer of police of equal or superior rank, or in charge of any police station, or, where any of the parties is in prison, before the governor or other keeper of such prison; and thereupon all the consequences of law shall ensue, and the provisions of this Act with respect to recognisances taken before a court of summary jurisdiction shall apply, as if the recognisance had been entered into before the said court as heretofore by law required.

43. *Procedure on the execution of distress warrants.*

Return by  
order of court  
of property  
taken from  
prisoner.

44. Where any property has been taken from a person charged before a court of summary jurisdiction with any offence punishable either on indictment or on summary conviction, a report shall be made by the police to such court of summary jurisdiction of the fact of such property having been taken from the person charged, and of the particulars of such property, and the court shall, if of opinion that the property, or any portion thereof, can be returned consistently with the interests of justice, and with the safe custody of the person charged, direct such property, or any portion thereof, to be returned to the person charged, or to such other person as he may direct.

Local jurisdic-  
tion of court  
under this Act.

45. Where a person is charged with an indictable offence mentioned in the First Schedule to this Act before a court of summary jurisdiction for any county, borough, or place, and the court have jurisdiction to commit such person for trial in such county, borough, or place, although the offence was not committed therein, such court shall also have jurisdiction to deal with the offence summarily in pursuance of this Act.

General pro-  
visions as to  
local jurisdic-  
tion of courts  
of summary  
jurisdiction.

46. For the purposes of the trial of any offence punishable on summary conviction under this Act or under any other Act, whether past or future, the following provisions shall have effect—

(1.) Where the offence is committed in any harbour, river, arm of the sea, or other water, tidal or other, which runs between or forms the boundary of the jurisdiction of two or more courts of summary jurisdiction, such offence may be tried by any one of such courts.

(2.) Where the offence is committed on the boundary of the jurisdiction of two or more courts of summary jurisdiction, or within the distance of five hundred yards of any such boundary, or is begun within the jurisdiction of one court and completed within the jurisdiction of another court of summary jurisdiction, such offence may be tried by any one of such courts.

(3.) Where the offence is committed on any person, or in respect of any property, in or upon any carriage, cart, or vehicle, whatsoever employed, in a journey, or on board any vessel whatsoever employed in a navigable river, lake, canal, or inland navigation, the person accused of such offence may be tried by any court of summary jurisdiction through whose jurisdiction such carriage, cart, vehicle, or vessel passed in the course of the journey or voyage during which the offence was committed; and, where the side, bank, centre, or other part of the highway, road, river, lake, canal, or inland navigation along which the carriage, cart, vehicle, or vessel passed in the course of such journey or voyage is the



boundary of the jurisdiction of two or more courts of summary jurisdiction, 42 & 48 Vict. c. 49.  
a person may be tried for such offence by any one of such courts.

(4.) Any offence which is authorised by this section to be tried by any court of summary jurisdiction may be dealt with, heard, tried, determined, adjudged, and punished, as if the offence had been wholly committed within the jurisdiction of such court.

Summary  
Jurisdiction  
Act, 1879,

47. *Application of Act to sums leviable by distress or payable under order.*

48. Anything required by this Act to be done by, to, or before a clerk of a court of summary jurisdiction shall be done by, to, or before the salaried clerk to a petty sessional division under section five of the Justices Clerks Act, 1877, and, where there is more than one such clerk, by either of such clerks or by such of those clerks as a court of summary jurisdiction for such division from time to time direct; and, if any other person acts as the clerk to a court of summary jurisdiction acting in and for such division, such person, subject to any rules made under this Act, shall be deemed for the purposes of this Act to have acted as the deputy of such salaried clerk, and shall make a return to the salaried clerk of all matters done by such court, and of all matters which the clerk of the court is required to enter in a register or otherwise to record:

As to clerk of  
court of sum-  
mary jurisdic-  
tion—40 & 41  
Vict. c. 48.

Provided, that nothing in this section shall apply where the court of summary jurisdiction is a court to whose clerk section five of the Justices' Clerks Act, 1877, does not apply; that is to say, the justices of a borough, or a metropolitan police court, or any stipendiary or other magistrate, the salary of whose clerk is regulated under any Act of Parliament, other than the Justices' Clerks Act, 1877, and the principal Act therein mentioned.

49. In this Act, if not inconsistent with the context, the following expressions have the meanings hereinafter respectively assigned to them; that is to say,

Special defini-  
tions for pur-  
poses of this  
Act—5 & 6  
Will. 4, c. 76.

The expression "Secretary of State" means one of Her Majesty's Principal Secretaries of State.

The expression "child" means a person who, in the opinion of the court before whom he is brought, is under the age of twelve years.

The expression "young person" means a person who, in the opinion of the court before whom he is brought, is of the age of twelve years and under the age of sixteen years.

The expression "adult" means a person who, in the opinion of the court before whom he is brought, is of the age of sixteen years or upwards.

The expression "person" includes a child, young person, and adult, and also includes a body corporate.

The expression "guardian," in relation to a child, includes any person, who, in the opinion of the court having cognisance of any case in which a child is concerned, has, for the time being, the charge of or control of such child.

The expression "prescribed" means prescribed or provided by any Act which relates to any offences, penalties, fines, costs, sums of money, orders, proceedings, or matters, to the punishment, recovery, making, or conduct of which the Summary Jurisdiction Acts expressly or impliedly apply or may be applied.

The expression "past Act" means any Act passed before the commencement of this Act, exclusive of this Act.

The expression "future Act" means any Act passed after the commencement of this Act.



42 & 43 Vict.  
c. 49.

*Summary  
Jurisdiction  
Act, 1879.*

The expression "fine" includes any pecuniary penalty or pecuniary forfeiture, or pecuniary compensation payable under a conviction.

The expression "county" includes any county, riding, division, parts, or liberty of a county having a separate court of quarter sessions.

The expression "borough" means a borough subject to the provisions of the Municipal Corporations Act, 1835, and the Acts amending the same.

The expression "local rate" means as respects any county, borough, or place, any county rate, borough rate, or other local rate out of which the costs of the prosecution of any felony committed within such county, borough, or place are payable.

The expressions "sum adjudged to be paid by a conviction," and "sum adjudged to be paid by an order," respectively include any costs adjudged to be paid by the conviction or order, as the case may be, of which the amount is ascertained by such conviction or order.

General defini-  
tions appli-  
cable to this  
and future  
Acts—11 & 12  
Vict. c. 43.

50. In this Act and any future Act, if not inconsistent with the context, the following expressions shall have the meaning hereinafter respectively assigned to them; that is to say,

The expression "The summary Jurisdiction Act, 1848," shall mean the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-three, intituled "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders:"

The expression "The Summary Jurisdiction Acts" and the expression "The Summary Jurisdiction (English) Acts" shall respectively mean the Summary Jurisdiction Act, 1848, and this Act and any Act, past or future, amending the Summary Jurisdiction Act, 1848, or this Act:

The expression "court of summary jurisdiction" shall mean—

Any justice or justices of the peace or other magistrate, by whatever name called, to whom jurisdiction is given by or who is or are authorised to act under the Summary Jurisdiction Acts or any of such Acts:

In any future Act, if not inconsistent with the context—

The expression "petty sessional court" shall have the same meaning as it has in this Act:

The expression "occasional court-house" shall mean such police station or other place as is for the time being appointed in pursuance of this Act to be used as an occasional court-house.

#### *Application of Acts.*

Application of  
Summary  
Jurisdiction  
Acts to future  
Acts.

51. The following regulations shall be made for the purpose of facilitating the application of the Summary Jurisdiction Acts to any future Act; that is to say,

(1.) Where in any future Act, any offence is directed or authorised to be prosecuted summarily or on summary conviction, or any fine is authorised to be recovered summarily or on summary conviction, or other words are used implying that such offence is to be prosecuted or fine is to be recovered in manner provided by the Summary Jurisdiction Acts, the Summary Jurisdiction Acts shall apply accordingly; and

(2.) Where in any future Act any sum of money is directed or authorised to be recovered before a court of summary jurisdiction, or

on complaint made to a court of summary jurisdiction, or words are used (whether by authorising the sum to be recovered summarily or in a summary manner or otherwise) which imply that such sum of money is to be recovered before a court of summary jurisdiction or in manner provided by the Summary Jurisdiction Acts, the Summary Jurisdiction Acts shall apply accordingly; and

42 & 43 Vict.  
c. 49.

Summary  
Jurisdiction  
Act, 1879.

- (3.) Where in any future Act a court of summary jurisdiction is authorised to order or require a person to do or abstain from doing any act or thing other than the payment of a sum of money; or where in pursuance of any such Act, any act or thing other than the payment of a sum of money is required or authorised by an order of a court of summary jurisdiction to be done, or is declared capable of being enforced summarily, or by summary order; or where in any such Act any words are used implying that such act or thing is to be enforced in manner provided by the Summary Jurisdiction Acts, the Summary Jurisdiction Acts shall apply accordingly.

### *Savings and Construction.*

52. The provisions of this Act which enable a court of summary jurisdiction, notwithstanding any enactment to the contrary, to impose imprisonment without hard labour, and reduce the prescribed period thereof, or do either of such acts, and in the case of a fine, if it be imposed as in respect of a first offence, to reduce the prescribed amount thereof, and in the case of imprisonment, to impose a fine in lieu of imprisonment, shall not apply to any proceedings taken under any Act relating to any of Her Majesty's regular or auxiliary forces.

Saving for  
Army, Navy  
Marine, and  
Militia Acts.

53. The Summary Jurisdiction Acts shall apply to all information, complaints, and other proceedings before a court of summary jurisdiction under the statutes relating to the Post Office.

Application of  
Summary  
Jurisdiction  
Acts to Post  
Office, Inland  
Revenue, and  
Customs.

Every offence under the statutes relating to the Post Office for which a person who is liable to forfeit a sum not exceeding twenty pounds may be prosecuted before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.

The Summary Jurisdiction Acts shall, notwithstanding any special provisions to the contrary contained in any of the statutes relating to Her Majesty's revenue under the control of the Commissioners of Inland Revenue or the Commissioners of Customs, apply to all informations, complaints, and other proceedings before a court of summary jurisdiction under or by virtue of any of any of the said statutes:

Provided, that where the sum adjudged by conviction under or by virtue of any of the said statutes to be paid exceeds fifty pounds, the period of imprisonment imposed by a court of summary jurisdiction in respect of the non-payment of such sum, or in respect of the default of a sufficient distress to satisfy such sum, may exceed three months but shall not exceed six months.

54. This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter, or so enforceable were a conviction on information, and shall apply to the proof of the service of any summons, notice, process, or document in any

Application  
and construc-  
tion of Act—  
11 & 12 Vict.  
c. 43.

42 & 48 Vict. matter of bastardy, and of any handwriting or seal in any such matter, and  
c. 49. to an appeal from an order in any matter of bastardy.

Summary  
Jurisdiction  
Act, 1879.

Nothing in this Act shall authorise a court of summary jurisdiction to reduce the amount of a fine where the Act prescribing such amount carries into effect a treaty, convention, or agreement with a foreign state, and such treaty, convention, or agreement stipulates for a fine of a minimum amount.

This Act shall be construed as one with the Summary Jurisdiction Act, 1848, so far as is consistent with the tenour of such Acts respectively, and save as aforesaid shall be subject to the exceptions specified in section thirty-five of the Summary Jurisdiction Act, 1848 :

Provided, that the provisions contained in sections thirty-three and thirty-four of the Summary Jurisdiction Act, 1848, as to the Acts relating to the police in the metropolis and in the city of London, and relating to the powers of justices within the metropolitan police district, shall not apply to or restrict the operation of this Act.

This Act shall not apply to any information, complaint, or other summary proceeding laid, made, or instituted before the commencement of this Act, or in respect of an offence committed, or any act done, or any cause which arose before the commencement of this Act, and any such information, complaint, or other proceeding as aforesaid may be laid, made, instituted, and proceeded with in the same manner as if this Act had not been passed.

#### *Repeal.*

Repeal of  
Acts.

55. There shall be repealed as from the commencement of this Act—

- (1.) The Acts mentioned in the Second Schedule to this Act to the extent in the third column of that schedule mentioned ; and
- (2.) So much of any other Act as is inconsistent with this Act.

Provided that this repeal shall not affect—

- (1.) Anything duly done or suffered before the commencement of this Act under any enactment hereby repealed ; or
- (2.) Any right or privilege acquired or any liability incurred before the commencement of this Act under any enactment hereby repealed ; or
- (3.) Any imprisonment, fine, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before the commencement of this Act under any enactment hereby repealed ; or
- (4.) The institution or prosecution to its termination of any investigation or legal proceeding or any other remedy for prosecuting any such offence or ascertaining, enforcing, or recovering any such liability, imprisonment, fine, forfeiture, or punishment as aforesaid, and any such investigation, legal proceeding, and remedy may be carried on as if this repeal had not been enacted.

Where any unrepealed Act of Parliament incorporates or refers to any provisions of any Acts hereby repealed, such unrepealed Act shall be deemed to incorporate or refer to the corresponding provisions of this Act.

## FIRST SCHEDULE.

42 & 48 Vict  
c. 49.Summary  
Jurisdiction  
Act, 1879.

INDICTABLE OFFENCES WHICH CAN BE DEALT WITH SUMMARILY UNDER THIS ACT.

FIRST COLUMN. Young Persons consenting and Adults pleading Guilty.	SECOND COLUMN. Adults consenting.
<p>1. Simple larceny</p> <p>2. Offences declared by any Act for the time being in force to be punishable as simple larceny.</p> <p>3. Larceny from or stealing from the person.</p> <p>4. Larceny as a clerk or servant.</p> <p>5. Embezzlement by a clerk or servant.</p> <p>6. Receiving stolen goods, that is to say, committing any of the offences relating to property specified in the ninety-first and ninety-fifth sections of the Larceny Act, 1861 (being the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-six), or in either of such sections.</p> <p>7. Aiding, abetting, counselling, or procuring the commission of simple larceny, or of an offence declared by any Act for the time being in force to be punishable as simple larceny, or of larceny, or stealing from the person, or of larceny as a clerk or servant.</p> <p>8. Attempt to commit simple larceny, or an offence declared by any Act for the time being in force to be punishable as simple larceny, or to commit larceny from or steal from the person, or to commit larceny as a clerk or servant.</p>	<p>1. Simple larceny, where the value of the whole of the property alleged to have been stolen does not in the opinion of the court before whom the charge is brought exceed forty shillings.</p> <p>2. Offences declared by any Act for the time being in force to be punishable as simple larceny, where the value of the whole of the property alleged to have been stolen, destroyed, injured, or otherwise dealt with by the offender does not in the opinion of the court before whom the charge is brought exceed forty shillings.</p> <p>3. Larceny from or stealing from the person, where the value of the whole of the property alleged to have been stolen does not in the opinion of the court before whom the charge is brought exceed forty shillings.</p> <p>4. Larceny as a clerk or servant, where the value of the whole of the property alleged to have been stolen does not in the opinion of the court before whom the charge is brought exceed forty shillings.</p> <p>5. Embezzlement by a clerk or servant, where the value of the whole of the property alleged to have been embezzled does not in the opinion of the court before whom the charge is brought exceed forty shillings.</p> <p>6. Receiving stolen goods, that is to say, committing any of the offences relating to property specified in the ninety-first and ninety-fifth sections of the Larceny Act, 1861 (being the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-six), or in either of such sections, where the value of the whole of the property alleged to have been received does not in the opinion of the court before whom the charge is brought exceed forty shillings.</p> <p>7. Aiding, abetting, counselling, or procuring the commission of simple larceny, or of an offence declared by any Act for the time being in force to be punishable as simple larceny, or of larceny or stealing from the person, or of larceny as a clerk or servant, where the value of the whole of the property which is the subject of the alleged offence does not in the opinion of the court before whom the charge is brought exceed forty shillings.</p> <p>8. Attempt to commit simple larceny, or an offence declared by any Act for the time being in force to be punishable as simple larceny, or to commit larceny from or steal from the person, or to commit larceny as a clerk or servant.</p>

42 & 48 VICT.  
c. 49.

Summary  
Jurisdiction  
Act, 1879.

This Act shall apply to any of the following offences when alleged to have been committed by a young person in like manner as if such offence were included in the first column of the schedule; that is to say,

- (1.) To any offence in relation to railways and railway carriages mentioned in sections thirty-two and thirty-three of the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter one hundred, intituled "An Act to consolidate and amend the statute law of England and Ireland relating to offences against the person;" and
- (2.) To any offence relating to railways mentioned in section thirty-five of the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-seven, intituled "An Act to consolidate and amend the statute law of England and Ireland relating to malicious injuries to property;" and
- (3.) To any indictable offence, either under the Post Office Laws or prosecuted by Her Majesty's Postmaster-General; and for the purpose of this provision the expression "Post Office Laws" has the same meaning as it has in the Act of the session of the seventh year of the reign of King William the Fourth and the first year of the reign of Her present Majesty, chapter thirty-six, intituled "An Act for consolidating the laws relative to offences against the Post Office of the United Kingdom, and for regulating the judicial administration of the Post Office Laws, and for explaining certain terms and expressions employed in those laws," and the Acts amending the same.

## SECOND SCHEDULE.

Session and Chapter.	Title.	Extent of Repeal.
10 & 11 Vict. c. 82	An Act for the more speedy trial and punishment of juvenile offenders.	The whole Act.
11 & 12 Vict. c. 43	An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders.	The following words in section thirty-five: "Nor to any information or complaint or other proceeding under or by virtue of any of the statutes relating to Her Majesty's Revenue of Excise or Customs, Stamps, Taxes, or Post Office."
13 & 14 Vict. c. 37	An Act for the further extension of summary jurisdiction in cases of larceny.	The whole Act, in so far as relates to England.
18 & 19 Vict. c. 126	An Act for diminishing expense and delay in the administration of Criminal Justice in certain cases.	The whole Act, in so far as relates to England, except sections eighteen, twenty, twenty-two, twenty-three, and twenty-four.
27 & 28 Vict. c. 80	An Act to extend the provisions of the Criminal Justice Act, 1855, to the Liberties of the Cinque Ports, and to the district of Romney Marsh in the county of Kent.	The whole Act.
27 & 28 Vict. c. 110	An Act for the amendment of the law relating to the mitigation of penalties.	The whole Act, so far as relates to England.
28 & 29 Vict. c. 127	An Act to amend the law relating to small penalties	The whole Act.
31 & 32 Vict. c. 116	An Act to amend the law relating to Larceny and Embezzlement.	Section two, in so far as relates to England.
34 & 35 Vict. c. 78	An Act to amend the law respecting the Inspection and Regulation of Railways.	Section thirteen, in so far as relates to England.

## PREVENTION OF CRIME ACT, 1879.

42 &amp; 43 VICT. CAP. 55.

42 & 43 VICT.  
c. 55.*Prevention of  
Crime Act,  
1879.*

*An Act to reduce the Minimum Term of Penal Servitude in the case of a previous conviction, and to amend the Law with respect to the notifications and reports made under sections five and eight of the Prevention of Crimes Act, 1871.—[15th August, 1879.]*

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Whereas by section two of the Penal Servitude Act, 1864, it is enacted as follows: "Where any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, or in Scotland, of any crime (whether such previous conviction shall have taken place upon an indictment, or under the provisions of the Act passed in the eighteenth and nineteenth of Victoria, chapter one hundred and twenty-six), the least sentence of penal servitude that can be awarded in such case shall be a period of seven years:" and it is expedient to repeal the said enactment: Be it therefore enacted as follows:

Repeal of 27  
& 28 Vict. c.  
47, s. 2, as to  
minimum for  
term sentence  
of penal servi-  
tude—27 & 28  
Vict. c. 47.

So much of section two of the Penal Servitude Act, 1864, as is above recited is hereby repealed so far as regards any sentence awarded after the commencement of this Act.

2. Whereas by section five of the Prevention of Crimes Act, 1871, it is enacted as follows:

Amendment  
of 34 & 35  
Vict. c. 112,  
ss. 5, 8, as to  
notification of  
residence and  
reports by  
convict hold-  
ing licence  
and offender  
under super-  
vision of the  
police—34 &  
35 Vict. c. 112.

"Every holder of a licence granted under the Penal Servitude Acts who is at large in Great Britain or Ireland shall notify the place of his residence to the chief officer of police of the district in which his residence is situated, and shall, whenever he changes such residence within the same police district notify such change to the chief officer of police of that district, and whenever he changes his residence from one police district to another shall notify such change of residence to the chief officer of police of the district which he is leaving and to the chief officer of police of the police district into which he goes to reside; moreover, every male holder of such a licence as aforesaid shall, once in each month, report himself at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself or to such other person as that officer may direct, and such report may, according as such chief officer directs, be required to be made personally or by letter:"

And whereas by section eight of the same Act a like provision is made in the case of persons who, on conviction, have been sentenced to be subject to the supervision of the police:

And whereas it is expedient to make further provision with respect to the said notification and report: Be it therefore enacted as follows:

Any holder of a licence required under section five, and any person subject to the supervision of the police required under section eight of the Prevention of Crimes Act, 1871, to notify his residence or any change of his residence to a chief officer of police shall comply with such requirement by personally presenting himself and declaring his place of residence to the constable or person who at the time when such notification is made



42 & 43 VICT. is in charge of the police station or office of which notice has been given  
c. 55. to such holder or person as the place for receiving his notification, or if  
— no such notice has been given, in charge of the chief office of such chief  
Prevention of officer of police.  
Crime Act,  
1879.

— The power of the chief officer of a police district to direct that the reports required by sections five and eight of the Prevention of Crimes Act, 1871, to be made by holders of licences and persons subject to the supervision of the police shall be made to some other person, shall extend to authorise him to direct such reports to be made to the constable or person in charge of any particular police station or office without naming the individual person.

Any appointment, direction, or authority purporting to be signed by the chief officer of police, and to have been made or given for the purposes of this Act, or of sections five and eight of the Prevention of Crimes Act, 1871, or one of them, shall be evidence, until the contrary is proved, that the appointment, direction, or authority thereby made or given was duly made, or given by the chief officer of police, and evidence that it appears from the records kept by authority of the chief officer of police that a person required as above mentioned to notify his residence or change of residence or make a report has failed to comply with such requirement, shall be *prima facie* evidence that the person has not complied with such requirement, but if the person charged alleges that he made such notification or report to any particular person or at any particular time, the court shall require the attendance of such persons as may be necessary to prove the truth or falsehood of such allegation.

Commence-  
ment of Act.

3. This Act shall come into operation on the first day of September, one thousand eight hundred and seventy-nine (which day is in this Act referred to as the commencement of this Act).

Short title.

4. This Act may be cited as the Prevention of Crime Act, 1879.

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# STATUTES AND PARTS OF STATUTES AFFECTING THE CRIMINAL LAW,

PASSED IN THE SESSION OF PARLIAMENT OF 1880.

## MERCHANT SEAMEN (PAYMENT OF WAGES AND RATING) ACT, 1880.

43 & 44 VICT. c. 16.

*An Act to amend the Law relating to the Payment of Wages and Rating of Merchant Seamen.*—[2nd August, 1880.]

5. Where a ship is about to arrive, is arriving, or has arrived at the end of her voyage, every person, not being in Her Majesty's service or not being duly authorised by law for the purpose, who—

- (a.) goes on board the ship, without the permission of the master, before the seamen lawfully leave the ship at the end of their engagement, or are discharged (whichever last happens); or,
- (b.) being on board the ship remains there after being warned to leave by the master, or by a police officer, or by any officer of the Board of Trade or of the Customs,

Penalty for being on board ship without permission before seamen leave. See 17 & 18 Vict. c. 104, s. 237.

shall for every such offence be liable on summary conviction to a fine not exceeding twenty pounds, or, at the discretion of the court, to imprisonment for any term not exceeding six months; and the master of the ship or any officer of the Board of Trade may take him into custody, and deliver him up forthwith to a constable to be taken before a court or magistrate capable of taking cognizance of the offence, and dealt with according to law.

10. The following provisions shall from the commencement of this Act have operation within the United Kingdom.

A seaman or apprentice to the sea service shall not be liable to imprisonment for deserting or for neglecting or refusing without reasonable cause to join his ship or to proceed to sea in his ship, or for absence without leave at any time within twenty-four hours of his ship's sailing from any port, or for absence at any time without leave and without sufficient reason from his ship or from his duty.

Desertion and absence without leave—17 & 18 Vict. c. 104.

Whenever, either at the commencement or during the progress of any voyage, any seaman or apprentice neglects or refuses to join or deserts from or refuses to proceed to sea in any ship in which he is duly engaged to serve, or is found otherwise absenting himself therefrom without leave, the master or any mate, or the owner, ship's husband, or consignee may, with or without the assistance of the local police officers or constables, who are hereby directed to give the same, if required, convey him on board: Provided that if the seaman or apprentice so requires he shall first be taken before some court capable of taking cognizance of the matters to be dealt with according to law; and that if it appears to the court before which the case is brought that the seaman or apprentice has

43 & 44 Vict. c. 16. *Merchant Seamen (Payment of Wages and Rating) Act, 1880.* been conveyed on board or taken before the court on improper or insufficient grounds, the master, mate, owner, ship's husband, or consignee, as the case may be, shall incur a penalty not exceeding twenty pounds, but such penalty, if inflicted, shall be a bar to any action for false imprisonment.

If a seaman or apprentice to the sea service intends to absent himself from his ship or his duty, he may give notice of his intention, either to the owner or to the master of the ship, not less than forty-eight hours before the time at which he ought to be on board his ship; and in the event of such notice being given, the court shall not exercise any of the powers conferred on it by section two hundred and forty-seven of the Merchant Shipping Act, 1854.

Subject to the foregoing provision of this section, the powers conferred by section two hundred and forty-seven of the Merchant Shipping Act, 1854, may be exercised, notwithstanding the abolition of imprisonment for desertion and similar offences, and of apprehension without warrant.

Nothing in this section shall affect section two hundred and thirty-nine of the Merchant Shipping Act, 1854.

### POST OFFICE (MONEY ORDERS) ACT, 1880.

43 & 44 Vict. c. 33.

*An Act relating to Post Office Money Orders.*—[7th September, 1880.]

Forgery of crossing of order.

3. Any person who, with intent to defraud, obliterates, adds to, or alters any such lines or words on an order issued under this Act, as would in the case of a cheque, be a crossing of that cheque, or knowingly offers, utters, or disposes of any order, with such fraudulent obliteration, addition, or alteration, shall be guilty of felony, and be liable to the like punishment as if such order were a cheque: Provided always, that any banker or corporation or company acting as bankers in the United Kingdom, who, in collecting in such capacity for any principal, shall have received payment or been allowed by the Postmaster-General in account in respect of any money order issued under this Act, or of any document purporting to be such a money order, shall not incur liability to anyone except such principal by reason of having received such payment or allowance, or having held or presented such order or document for payment; but this section shall not relieve any principal for whom such order or document shall have been so held or presented of any liability in respect of his possession of the same or of the proceeds thereof.

Fraud and forgery—3 & 4 Vict. c. 96—11 & 12 Vict. c. 88—24 & 25 Vict. c. 98—24 & 25 Vict. c. 96.

4. (1.) The enactments providing for the punishment of offences relating to stamp duties shall apply in like manner as if the poundage under this Act were a stamp duty.

(2.) Sections nineteen, twenty-two, twenty-three, twenty-six, twenty-nine, and thirty of the Post Office Duties Act, 1840 (which relate to dies and paper, and to plates and instruments, and to moulds, frames, instruments, and machinery for the making of paper, and to the punishing of fraud), shall apply as if herein re-enacted, with the substitution of poundage under this Act for the duties therein mentioned, and of orders under this Act for the envelopes therein mentioned.

(3.) An officer of the Post Office who re-issues an order previously paid shall be deemed to have issued the order with a fraudulent intent within

the meaning of section four of the Post Office (Money Orders) Act, 1848, and shall be punished accordingly, and that section as amended by this Act shall extend to an offence when committed in the Channel Islands or the Isle of Man in like manner as if they were mentioned in that section after Ireland, and penal servitude were substituted for transportation.

43 & 44 VICT.  
c. 33.  
—  
*Post Office  
(Money  
Orders) Act,  
1880.*  
—

(4.) An order under this Act shall be deemed to be an order for the payment of money and a valuable security within the meaning of the Post Office Acts and of the Forgery Act, 1861 (that is to say, the Act of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-eight), and of section one of the Larceny Act, 1861, and of any other law relating to forgery or stealing, which is for the time being in force in any part of the United Kingdom, the Channel Islands, or Isle of Man.

### WILD BIRDS PROTECTION ACT, 1880.

43 & 44 VICT. c. 35.

(See post, p. xlvii.)

*An Act to amend the Laws relating to the Protection of Wild Birds.*—[7th September, 1880.]

3. Any person who between the first day of March and the first day of August in any year after the passing of this Act shall knowingly and wilfully shoot or attempt to shoot, or shall use any boat for the purpose of shooting or causing to be shot, any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, or shall expose or offer for sale, or shall have in his control or possession after the fifteenth day of March, any wild bird recently killed or taken, shall, on conviction of any such offence before any two justices of the peace in England and Wales or Ireland, or before the sheriff in Scotland, in the case of any wild bird which is included in the schedule hereunto annexed, forfeit and pay for every such bird in respect of which an offence has been committed a sum not exceeding one pound, and, in the case of any other wild bird, shall for a first offence be reprimanded and discharged on payment of costs, and for every subsequent offence forfeit and pay for every such wild bird in respect of which an offence is committed a sum of money not exceeding five shillings, in addition to the costs, unless such person shall prove that the said wild bird was either killed or taken, or bought, or received during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom. This section shall not apply to the owner or occupier of any land, or to any person authorised by the owner or occupier of any land, killing or taking any wild bird on such land not included in the schedule hereto annexed.

Penalties for  
shooting or  
taking wild  
birds.

4. Where any person shall be found offending against this Act, it shall be lawful for any person to require the person so offending to give his Christian name, surname, and place of abode, and in case the person so offending shall, after being so required, refuse to give his real name or place of abode, or give an untrue name or place of abode, he shall be liable on being convicted of any such offence to forfeit and pay in addition to the penalties imposed by section three, such sum of money not

Penalty for  
refusing to  
give name and  
place of abode.

43 & 44 Vict. exceeding ten shillings sterling as to the justices or sheriff shall seem  
c. 35. meet.

*Wild Birds*  
*Protection Act,*  
1880. 5. All offences under this Act may be prosecuted, and penalties and for-  
feitures under this Act recovered,—

- (1.) In England in manner provided by the Summary Jurisdiction  
(England) Acts; and  
(2.) In Scotland before the sheriff in manner provided by the Summary  
Procedure Act, 1864, and any Acts amending the same; and  
(3.) In Ireland within the police district of Dublin metropolis, in  
manner provided by the Acts regulating the powers and duties of  
justices of the peace for such district, or of the police of such  
district, and elsewhere in Ireland before two justices in manner  
provided by the Petty Sessions (Ireland) Act, 1851, and any Act  
amending the same.

As to trial of offences com-  
mitted within  
the Admiralty  
jurisdiction. 6. All offences mentioned in this Act which shall be committed within  
the jurisdiction of the Admiralty shall be deemed to be offences of the  
same nature and liable to the same punishments as if they had been  
committed upon any land in the United Kingdom, and may be dealt with,  
inquired of, tried and determined in any county or place in the United  
Kingdom in which the offender shall be apprehended or be in custody or  
be summoned, in the same manner in all respects as if such offences had  
been actually committed in that county or place; and in any information  
or conviction for any such offence, the offence may be averred to have been  
committed "on the high seas." And in Scotland any offence committed  
against this Act on the sea coast or at sea beyond the ordinary jurisdiction  
of any sheriff, justice or justices of the peace, shall be held to have been  
committed in any county abutting on such sea coast or adjoining such sea,  
and may be tried and punished accordingly.

Where any offence under this Act is committed in or upon any waters  
forming the boundary between any two counties, districts of quarter  
sessions, or petty sessions, such offence may be prosecuted before any  
justices of the peace or sheriff in either of such counties or districts.

## CRIMINAL LAW AMENDMENT ACT, 1880.

43 & 44 VICT. CAP. 45.

*An Act to amend the Criminal Law as to Indecent Assaults on Young  
Persons.*—[7th September, 1880.]

Be it enacted by the Queen's most Excellent Majesty, by and with the  
advice and consent of the Lords Spiritual and Temporal, and Commons,  
in this present Parliament assembled, and by the authority of the same.  
as follows :

Short title. 1. This Act may be cited for all purposes as "The Criminal Law  
Amendment Act, 1880."

Consent of  
young person  
to be no  
defence. 2. It shall be no defence to a charge or indictment for an indecent  
assault on a young person under the age of thirteen to prove that he or  
she consented to the act of indecency.

**STATUTES AND PARTS OF STATUTES  
AFFECTING THE CRIMINAL LAW,  
PASSED IN THE SESSION OF PARLIAMENT OF 1881.**

**CUSTOMS AND INLAND REVENUE ACT, 1881.**

44 VICT. CAP. 12.

*An Act to grant certain Duties of Customs and Inland Revenue, to alter other Duties, and to amend the Laws relating to Customs and Inland Revenue.*—[3rd June, 1881.]

12. Any officer of customs or other person duly employed in the prevention of smuggling may search any person on board any ship or boat within the limits of any port in the United Kingdom or the Channel islands, or any person who shall have landed from any ship or boat, provided such officer or other person duly employed as aforesaid shall have good reason to suppose that such person is carrying or has any uncustomed or prohibited goods about his person. Persons may be searched if officers have reason to suspect smuggled goods are concealed upon them.

A person shall be guilty of an offence—

- (1.) If he staves, breaks, or destroys any goods to prevent the seizure thereof by an officer of customs or other person authorised to seize the same. Rescuing goods.
- (2.) If he rescues, or staves, breaks or destroys to prevent the securing thereof any goods seized by an officer of customs or other person authorised to seize the same.
- (3.) If he rescues any person apprehended for any offence punishable by fine or imprisonment under the Customs Acts. Rescuing persons.
- (4.) If he prevents the apprehension of any such person.
- (5.) If he assaults or obstructs any officer of customs, or any officer of the Army, Navy, Marines, Coast Guard, or other person duly employed for the prevention of smuggling, going, remaining, or returning from on board a ship or boat within the limits of any port in the United Kingdom or the Channel islands, or in searching such a ship or boat, or in searching a person who has landed from any such ship or boat, or in seizing any goods liable to forfeiture under the Customs Acts, or otherwise acting in the execution of his duty. Assaulting or obstructing officers.
- (6.) If he attempts or endeavours to commit, or aids, abets, or assists in the commission of any of the offences mentioned in this section. Attempting the foregoing offences.

And a person so offending shall for each such offence forfeit the penalty of not exceeding one hundred pounds, and he may either be detained or proceeded against by information and summons. Penalty.



44 & 45 VICT.  
c. 24.

Summary  
Jurisdiction  
(Process) Act,  
1881.

# SUMMARY JURISDICTION (PROCESS) ACT, 1881.

44 & 45 VICT. CAP. 24.

*An Act to Amend the Law respecting the Service of Process of Courts of Summary Jurisdiction in England and Scotland.*—[18th July, 1881.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Short title.

1. This Act may be cited as the Summary Jurisdiction (Process) Act, 1881.

This Act shall be deemed to be included in the expressions "Summary Jurisdiction Acts" and "Summary Jurisdiction (English) Acts."

Extent of Act.

2. This Act shall not apply to Ireland.

Commence-  
ment of Act.

3. This Act shall come into operation on the first day of October one thousand eight hundred and eighty-one (which day is in this Act referred to as the commencement of this Act).

Service of pro-  
cess of Eng-  
lish court in  
Scotland and  
of Scotch  
court in Eng-  
land.

4. Subject to the provisions of this Act, any process issued under the Summary Jurisdiction Acts may, if issued by a court of summary jurisdiction in England and endorsed by a court of summary jurisdiction in Scotland, or issued by a court of summary jurisdiction in Scotland and endorsed by a court of summary jurisdiction in England, be served and executed within the jurisdiction of the endorsing court in like manner as it may be served and executed within the jurisdiction of the issuing court, and that by an officer either of the issuing or of the endorsing court.

For the purposes of this Act—

(1.) Any process may be issued and endorsed under the hand of any such person as is declared by this Act to be a court of summary jurisdiction, and may be endorsed upon proof alone of the handwriting of the person issuing it, and such proof may be either on oath or by such solemn declaration as is mentioned in section forty-one of the Summary Jurisdiction Act, 1879, or by any like declaration taken in Scotland before a sheriff, justice of the peace, or other magistrate having the authority of a justice of the peace. Such indorsement may be in the form contained in the schedule to this Act annexed, or in a form to the like effect :

(2.) Where any process requiring the appearance of a person to answer any information or complaint has been served in pursuance of this section, the court, before issuing a warrant for the apprehension of such person for failure so to appear, shall be satisfied on oath that there is sufficient *prima facie* evidence in support of such information or complaint :

(3.) If the process is to procure the attendance of a witness, the court issuing the process shall be satisfied on oath of the probability that the evidence of such witness will be material, and that the witness will not appear voluntarily without such process, and the witness shall not be subject to any liability for not obeying the process, unless a reasonable amount for his expenses has been paid or tendered to him :

- (4.) This Act shall not apply to any process requiring the appearance of a person to answer a complaint if issued by an English court of summary jurisdiction for the recovery of a sum of money which is a civil debt within the meaning of the Summary Jurisdiction Act, 1879, or if issued by a Scotch court in a case which falls within the definition of "civil jurisdiction" contained in the Summary Procedure Act, 1864. 44 & 45 Vict.  
c. 24.  
—  
Summary  
Jurisdiction  
(Process) Act,  
1881.

5. Where a person is apprehended under any process executed in pursuance of this Act such person shall be forthwith taken to some place within the jurisdiction of the court issuing the process, and be there dealt with as if he had been there apprehended. Provision as to  
execution of  
process.

A warrant of distress issued in England when endorsed in pursuance of this Act shall be executed in Scotland as if it were a Scotch warrant of poinding and sale, and a Scotch warrant of poinding and sale when endorsed in pursuance of this Act shall be executed in England as if it were an English warrant of distress, and the enactments relating to the said warrants respectively shall apply accordingly, except that any account of the costs and charges in connection with the execution, or of the money levied thereby or otherwise relating to the execution, shall be made, and any money raised by the execution shall be dealt with in like manner as if the warrant had been executed within the jurisdiction of the court issuing the warrant.

6. A court of summary jurisdiction in England and a sheriff court in Scotland shall respectively have jurisdiction by order or decree to adjudge a person within the jurisdiction of the court to pay for the maintenance and education of a bastard child of which he is the putative father, and for the expenses incidental to the birth of such child, and for the funeral expenses of such child, notwithstanding that such person ordinarily resides, or the child has been born, or the mother of it ordinarily resides, where the court is English, in Scotland, or where the court is Scotch, in England, in like manner as the court has jurisdiction in any other case. Provision as to  
bastardy pro-  
ceedings in  
England and  
Scotland.

Any process issued in England or Scotland to enforce obedience to such order or decree may be endorsed and executed in Scotland and England respectively in manner provided by this Act with respect to process of a court of summary jurisdiction.

Any bastardy order of a court of summary jurisdiction in England may be registered in the books of a sheriff court in Scotland, and thereupon a warrant of arrestment may be issued in like manner as if such order were a decree of the said sheriff court.

7. This Act shall be in addition to and not in derogation of any power existing under any other Act relating to the execution of any warrant or other process in England and Scotland respectively. Saving.

8. In this Act, unless the context otherwise requires,—

Definitions.

The expression "process" includes any summons or warrant of citation to appear either to answer any information or complaint, or as a witness; also any warrant of commitment, any warrant of imprisonment, any warrant of distress, any warrant of poinding and sale, also any order or minute of a court of summary jurisdiction or copy of such order or minute, also an extract decree, and any other document or process, other than a warrant of arrestment, required for any purpose connected with a court of summary jurisdiction to be served or executed.

The expression "Summary Jurisdiction Acts" as regards England has the same meaning as in the Summary Jurisdiction Act, 1879, and as 42 & 43 Vict.  
c. 49; 27 & 28  
Vict. c. 53.

44 & 45 VICT. c. 24. regards Scotland, means the Summary Procedure Act, 1864, and any Act, past or future, amending that Act.

Summary Jurisdiction (Process) Act, 1881. The expression "sheriff" shall include sheriff substitute.  
The expression "court of summary jurisdiction" means any justice of the peace, also any officer or other magistrate having the authority in England or Scotland of a justice of the peace, also in Scotland the sheriff.

The expression "officer of a court of summary jurisdiction" means the constable, officer, or person to whom any process issued by the court is directed, or who is by law required or authorised to serve or execute any process issued by the court.

#### SCHEDULE.

##### INDORSEMENT IN BACKING A PROCESS.

Whereas proof hath this day been made before me, one of Her Majesty's justices of the peace [sheriff or other magistrate] for the [county or burgh] of , that the name of *A.B.* to the within warrant [or summons or order or minute, or copy of order or minute or other document] subscribed is of the handwriting of the justice of the peace [sheriff or other magistrate] within mentioned, I do therefore hereby authorise *C.D.* who bringeth to me this warrant [or summons or order or minute, or copy of order or minute or other document,] and all other persons by whom the same may be lawfully served [or executed], and also all constables and other peace officers of the said [county or burgh] of to serve and execute the same within the said last-mentioned [county or burgh].

Given under my hand this                      day of                      18 .

#### ALKALI, &c., WORKS REGULATION ACT, 1881.

44 & 45 VICT. CAP. 37.

*An Act to consolidate the Alkali Acts, 1863 and 1874, and to make further provision for regulating Alkali and certain other works in which noxious or offensive gases are evolved.—[11th August, 1881.]*

Prevention of nuisance from alkali waste already deposited or discharged.

7. Where alkali waste has been deposited or discharged, either before or after the commencement of this Act, and complaint is made to the chief inspector that a nuisance is occasioned thereby, the chief inspector if satisfied of the existence of the nuisance, and that it is within the power of the owner or occupier of the land to abate it, shall serve a notice on such owner or occupier requiring him to abate the nuisance; and if such owner or occupier fails to use the best practicable and reasonably available means for the abatement thereof he shall be liable to a fine not exceeding twenty pounds, and if he does not proceed to use such means within such time as shall be limited by the court inflicting such fine then he shall be liable to a further penalty of five pounds per day from the expiration of the time so limited.

Recovery of fines for offences against Act in County Court.

22. The following regulations are hereby enacted with respect to the recovery of fines for offences other than offences against a special rule:

Every such fine shall be recovered by action in the county court having jurisdiction in the district in which the offence is alleged to have been committed:

The action shall be brought, with the sanction of the central authority.

by the chief inspector, or by such other inspector as the Local Government Board may in any particular case direct, within three months after the commission of the offence, and for the purposes of such action the fine shall be deemed to be a debt due to such inspector :

44 & 45 Vict.  
c. 87.

*Alkali, &c.,  
Works Regu-  
lation Act,  
1881.*

The plaintiff in any action for a fine under this Act shall be presumed to be an inspector authorised under this Act to bring the action, until the contrary is proved by the defendant :

The court may, on the application of either party, appoint a person to take down in writing the evidence of the witnesses, and may award to that person such remuneration as the court thinks just ; and the amount so awarded shall be deemed to be costs in the action :

If either party in any action under this Act feels aggrieved by the decision of the court in point of law, or on the merits or in respect of the admission or rejection of any evidence, he may appeal from that decision to the High Court of Justice :

The appeal shall be in the form of a special case to be agreed on by both parties or their solicitors, and if they cannot agree, to be settled by the judge of the County Court on the application of the parties or their solicitors :

The court of appeal may draw any inference from the facts stated in the case that a jury might draw from the facts stated by witnesses :

Subject to the provisions of this section, all the enactments, rules, and orders relating to proceedings in actions in County Courts, and to enforcing judgments in County Courts, and appeals from decisions of the County Court judges, and to the conditions of such appeals, and to the power of the High Court of Justice, or any division or judge thereof, on such appeals, shall apply to an action for a fine under this Act, and to an appeal from such action, in the same manner as if such action and appeal related to a matter within the ordinary jurisdiction of the court :

Within the city of London and the liberties thereof the sheriff's court, established by a Local Act passed in the eleventh year of the reign of Her present Majesty, chapter seventy-one, intituled an Act for the more easy recovery of small debts and demands within the City of London and the liberties thereof, shall be deemed to be the County Court for the purposes of this Act :

In Scotland the court of the sheriff or sheriff substitute of the county in which the offence is committed shall be the County Court for the purposes of this Act, and may award costs to either party, and may sentence the offender to imprisonment for any period not exceeding six months, unless the fine and costs be previously paid ; and any decision or sentence of such sheriff or sheriff substitute shall be subject to review and appeal according to law :

In Ireland such fines as are in this section mentioned may be recovered by civil bill, in the manner and with the appeal directed by an Act passed in the fourteenth and fifteenth years of Her present Majesty, chapter fifty-seven, or any Act or Acts amending the law relating to civil bills.

23. In any proceeding under this Act in relation to a fine for an offence other than an offence against a special rule—

(a.) It shall be sufficient to allege that any work is a work to which this Act applies, without more ; and

Further pro-  
visions as to  
recovery of  
fines in  
County Court.

44 & 45 Vict.  
c. 37.

*Alkali, &c.,  
Works Regu-  
lation Act,  
1881.*

(b.) It shall be sufficient to state the name of the registered or ostensible owner of the work, or the title of the firm by which the employer of persons in such work is usually known.

A person shall not be subject to a fine under this Act for more than one offence in respect of the same work or place in respect of any one day.

Not less than twenty-one days before the hearing of any proceeding against an owner to recover a fine under this Act for failing to secure the condensation of any gas to the satisfaction of the chief inspector, or for failing to use the best practicable means, as required by this Act, an inspector shall serve on the owner proceeded against a notice in writing, stating, as the case requires, either the facts on which such chief inspector founds his opinion, or the means which such owner has failed to use, and the means which, in the chief inspector's opinion, would suffice, and shall produce a copy of such notice before the court having cognisance of the matter.

A person shall not be liable under this Act to an increased fine in respect of a second offence, or in respect of a third, or any subsequent offence, unless a fine has been recovered within the preceding twelve months against such person for the first offence, or for the second or other offence, as the case may be.

Application of  
fines.

24. All fines recovered under this Act, except in respect of offences against a special rule, shall be paid into the receipt of Her Majesty's Exchequer.

Discharge of  
owner on con-  
viction of  
actual offender

25. The owner of a work in which an offence under this Act other than an offence against a special rule has been proved to have been committed shall in every case be deemed to have committed the offence, and shall be liable to pay the fine, unless he proves to the satisfaction of the court before which any proceeding is instituted to recover such fine, that he had used due diligence to comply with and to enforce the execution of this Act, and that the offence in question was committed by some agent, servant, or workman, whom he shall charge by name as the actual offender, without his knowledge, consent, or connivance: in which case such agent, servant, or workman shall be liable to pay the fine, and proceedings may be taken against him for the recovery thereof, and of the costs of all proceedings which may be taken either against himself or against the owner under this Act:

Provided that it shall be lawful for the inspector to proceed in the first instance against the person whom he believes to be the actual offender, without first proceeding against the owner, in any case in which it is made to appear to the satisfaction of such inspector that the owner has used all due diligence to comply with and to enforce the execution of this Act, and that the offence has been committed by the person whom he may charge therewith without the knowledge, consent, or connivance of the owner, and in contravention of his orders.

Service of  
notices.

26. Any notice, summons, or other document under this Act, may be in writing or print, or partly in writing and partly in print.

Any notice, summons, or document required or authorised for the purposes of this Act to be delivered to, or served on, or sent to, the owner of any work, may be served by delivering the same to the owner, or at his residence or works; it may also be served or sent by post by a prepaid letter, and, if served or sent by post, shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post; and, in proving such service or sending, it shall be sufficient to prove that it was properly

addressed and put into the post; and the same shall be deemed to be properly addressed if addressed to the registered address of an owner, or, when required to be served on or sent to the owner of any works, if addressed to the owner of the works at the works, with the addition of the proper postal address, but without naming the person who is the owner.

44 & 45 Vict.  
c. 37.  
—  
*Alkali, &c.,  
Works Regu-  
lation Act,  
1881.*

27. Where it appears to any sanitary authority, on the written representation of any of their officers, or of any ten inhabitants of their district, that any work (either within or without the district) to which this Act applies is carried on in contravention of this Act, or that any alkali waste is deposited (either within or without the district) in contravention of this Act, and that a nuisance is occasioned by such contravention to any of the inhabitants of their district, such authority may complain to the central authority, who shall make such inquiry into the matters complained of, and, after the inquiry, may direct such proceedings to be taken by an inspector as they think just,

Complaint by  
sanitary  
authority in  
cases of  
nuisance.

The sanitary authority complaining shall, if so required by the central authority, pay the expense of any such inquiry, and may pay the same out of the fund or rate applicable to the general expenses of such authority.

The expression "sanitary authority" in this section includes, as regards the Metropolis, except the city of London, any vestry or district board elected under the Metropolis Management Act, 1855, also any local board of health, not being an urban sanitary authority within the meaning of the Public Health Act, 1875, and, as regards the City of London shall mean the Commissioners of Sewers of the said city,

18 & 19 Vict.  
c. 120.  
38 & 39 Vict.  
c. 55.

## PEDLARS ACT, 1881.

44 & 45 Vict. CAP. 45.

*An Act to amend the Pedlars Act, 1871, as regards the district within which a certificate authorises a person to act as Pedlar—[22nd August, 1881.]*

2. A pedlar's certificate granted under the Pedlars Act, 1871, shall, during the time for which it continues in force, authorise the person to whom it is granted to act as a pedlar within any part of the United Kingdom.

The Pedlars Certificate Act, 1871, is repealed to the extent in the third column of the schedule to this Act mentioned.

Alteration of  
34 & 35 Vict.  
c. 96, so far  
as regards  
requiring in-  
dorsement of a  
pedlar's certi-  
ficate.

## SCHEDULE.

### ENACTMENTS REPEALED.

A description or citation of a portion of an Act in this schedule is inclusive of the word, section, or other part first and last mentioned or otherwise referred to as forming



44 & 45 VICT. the beginning, or as forming the end, of the portion described in the description or  
c. 45. citation.

<i>Pedlars Act,</i> 1881.	Session and Chapter.	Title.	Extent of Repeal.
	84 & 85 Vict. c. 96	The Pedlars Act, 1871.	Section four, from "or acts as a pedlar in any district" down to "this Act;" section six, from "a pedlar's certificate" down to "taken out;" section seven; in section eight the words "and of the indorsement of certificates" and the words "and made;" section twelve so far as it relates to an indorsement, and section fifteen so far as it relates to an indorsement.

### WILD BIRDS PROTECTION ACT, 1881.

44 & 45 VICT. CAP. 51.

*An Act to explain the Wild Birds Protection Act, 1880.*—[22nd August, 1881.]

Amendment of  
sect. 8 of 48 &  
44 Vict. c. 35. 1. The above-recited exception in section three of the Wild Birds Protection Act, 1880, shall be repealed, and in lieu thereof the following enactment shall have effect:

A person shall not be liable to be convicted under section three of the Wild Birds Protection Act, 1880, of exposing or offering for sale, or having the control or possession of, any wild bird recently killed, if he satisfies the court before whom he is charged either—

(1.) That the killing of such wild bird, if in a place to which the said Act extends, was lawful at the time when and by the person by whom it was killed; or

(2.) That the wild bird was killed in some place to which the said Act does not extend, and the fact that the wild bird was imported from some place to which the said Act does not extend shall, until the contrary is proved, be evidence that the bird was killed in some place to which the said Act does not extend.

Amendment of  
Schedule to  
48 & 44 Vict.  
c. 35. 2. The Schedule to the Wild Birds Protection Act, 1880, shall be read and construed as if the word "Lark" had been inserted therein.

## NEWSPAPER LIBEL AND REGISTRATION ACT, 1881.

44 &amp; 45 VICT. CAP. 60.

44 & 45 VICT.  
c. 60.*Newspaper  
Libel and  
Registration  
Act, 1881.**An Act to amend the Law of Newspaper Libel, and to provide for the  
Registration of Newspaper Proprietors.—[27th August, 1881.]*

2. Any report published in any newspaper of the proceedings of a public meeting shall be privileged, if such meeting was lawfully convened for a lawful purpose and open to the public, and if such report was fair and accurate, and published without malice, and if the publication of the matter complained of was for the public benefit; provided always, that the protection intended to be afforded by this section shall not be available as a defence in any proceeding, if the plaintiff or prosecutor can show that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of such plaintiff or prosecutor.

Newspaper  
reports of cer-  
tain meetings  
privileged.

3. No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England or Her Majesty's Attorney-General in Ireland being first had and obtained.

No prosecu-  
tion for news-  
paper libel  
without fiat  
of Attorney-  
General.

4. A court of summary jurisdiction, upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate, and published without malice, and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial on indictment, and the court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case.

Inquiry by  
court of sum-  
mary jurisdic-  
tion as to libel  
being for  
public benefit  
or being true.

5. If a court of summary jurisdiction upon the hearing of a charge against a proprietor, publisher, editor, or any person responsible for the publication of a newspaper for a libel published therein is of opinion that though the person charged is shown to have been guilty the libel was of a trivial character, and that the offence may be adequately punished by virtue of the powers of this section, the court shall cause the charge to be reduced into writing and read to the person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury or do you consent to the case being dealt with summarily?" and, if such person assents to the case being dealt with summarily, the court may summarily convict him and adjudge him to pay a fine not exceeding fifty pounds.

Provision as to  
summary con-  
viction for  
libel.

Section twenty-seven of the Summary Jurisdiction Act, 1879, shall, so far as is consistent with the tenor thereof, apply to every such proceeding as if it were herein enacted and extended to Ireland, and as if the Summary Jurisdiction Acts were therein referred to instead of the Summary Jurisdiction Act, 1848.

42 & 43 Vict.  
c. 49.  
11 & 12 Vict.  
c. 43.

6. Every libel or alleged libel, and every offence under this Act shall be deemed to be an offence within and subject to the provisions of the Act of the session of the twenty-second and twenty-third years of the

22 & 23 Vict.  
c. 17 made ap-  
plicable to this  
Act.

- 44 & 54 Vict. c. 60. reign of Her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanors."
- Newspaper Libel and Registration Act, 1881.*
- Register of newspaper proprietors to be established.
- Annual returns to be made.
- Penalty for omission to make annual returns.
- Power to party to make return.
- Penalty for wilful misrepresentation in or omission from return.
- Copies of entries in and extracts from register to be evidence.
- Recovery of penalties and enforcement of orders.
8. A register of the proprietors of newspapers as defined by this Act shall be established under the superintendence of the registrar.
9. It shall be the duty of the printers and publishers for the time being of every newspaper to make or cause to be made to the Registry Office on or before the thirty-first of July one thousand eight hundred and eighty-one, and thereafter annually in the month of July in every year, a return of the following particulars according to the Schedule A. hereunto annexed; that is to say,
- (a.) The title of a newspaper:
- (b.) The names of all the proprietors of such newspaper together with their respective occupations, places of business (if any), and places of residence.
10. If within the further period of one month after the time hereinbefore appointed for the making of any return as to any newspaper such return be not made, then each printer and publisher of such newspaper shall, on conviction thereof, be liable to a penalty not exceeding twenty-five pounds, and also to be directed by a summary order to make a return within a specified time.
11. Any party to a transfer or transmission of or dealing with any share of or interest in any newspaper whereby any person ceases to be a proprietor, or any new proprietor is introduced, may at any time make or cause to be made to the Registry Office a return according to the Schedule B. hereunto annexed and containing the particulars therein set forth.
12. If any person shall knowingly and wilfully make or cause to be made any return by this Act required or permitted to be made in which shall be inserted or set forth the name of any person as a proprietor of a newspaper who shall not be a proprietor thereof, or in which there shall be any misrepresentation, or from which there shall be any omission in respect of any of the particulars by this Act required to be contained therein whereby such return shall be misleading, or if any proprietor of a newspaper shall knowingly and wilfully permit any such return to be made which shall be misleading as to any of the particulars with reference to his own name, occupation, place of business (if any), or place of residence, then and in every such case every such offender being convicted thereof shall be liable to a penalty not exceeding one hundred pounds.
15. Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient *prima facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.
16. All penalties under this Act may be recovered before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.
- Summary orders under this Act may be made by a court of summary jurisdiction, and enforced in manner provided by section thirty-four of the Summary Jurisdiction Act, 1879; and, for the purposes of this Act, that section shall be deemed to apply to Ireland in the same manner as if it were re-enacted in this Act.

## PETROLEUM (HAWKERS) ACT, 1881.

44 & 45 VICT.  
c. 67.

44 &amp; 45 VICT. CAP. 67.

*Petroleum*  
*(Hawkers)*  
*Act, 1881.*

*An Act to regulate the hawking of Petroleum and other substances of a like nature.—[27th August, 1881.]*

1. Any person who is licensed in pursuance of the Petroleum Act, 1871, to keep petroleum to which this Act applies may, subject to the enactments for the time being in force with respect to hawkers and pedlars, hawk such petroleum by himself or his servants. Power to hawk petroleum—84 & 85 Vict. c. 105.

2. With respect to the hawking of petroleum to which the Petroleum Act, 1871, applies, the following regulations shall be observed : Regulations for hawking petroleum.

- (1.) The amount of petroleum conveyed at one time in any one carriage shall not exceed twenty gallons :
- (2.) The petroleum shall be conveyed in a closed vessel so constructed as to be free from leakage :
- (3.) The carriage in which the vessels containing the petroleum are conveyed shall be so ventilated as to prevent any evaporation from the petroleum mixing with the air in or about the carriage in such proportion as to produce or be liable to produce an explosive mixture :
- (4.) Any fire or light or any article of an explosive or highly inflammable nature shall not be brought into or dangerously near to the carriage in which the vessels containing the petroleum are conveyed :
- (5.) The carriage in which the vessels containing the petroleum are conveyed shall be so constructed or fitted that the petroleum cannot escape therefrom in the form of liquid, whether ignited or otherwise :
- (6.) Proper care shall be taken to prevent any petroleum escaping into any part of a house or building, or of the curtilage thereof, or into a drain or sewer :
- (7.) The petroleum shall be stored in some premises licensed for keeping of petroleum and in accordance with the licence for such premises both every night and also when the petroleum is not in the course of being hawked :
- (8.) All due precautions shall be taken for the prevention of accidents by fire or explosion, and for preventing unauthorised persons having access to the vessels containing the petroleum, and every person concerned in hawking the petroleum shall abstain from any act whatever which tends to cause fire or explosion, and is not reasonably necessary for the purpose of such hawking :
- (9.) No article or substance of an explosive or inflammable character other than petroleum, nor any article liable to cause or communicate fire or explosion, shall be in the carriage while such carriage is being used for the purpose of hawking petroleum :

In the event of any contravention of this section with reference to any petroleum, the petroleum, together with the vessels containing and the carriage conveying the same, shall be liable to be forfeited, and in addition thereto the licensee by whom or by whose servants the petroleum was being hawked shall be liable on summary conviction to a penalty not exceeding twenty pounds.

Provided that—

44 & 45 Vict.  
c. 67.

*Petroleum  
(Hawkers)  
Act, 1881.*

(1.) Where some servant of the licensee or other person has in fact committed the offence, such servant or other person shall be liable to the same penalty as if he were the licensee :

(2.) Where the licensee is charged with a contravention of this section, he shall be entitled upon information duly laid by him to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge, and if the licensee proves to the satisfaction of the court that he had used due diligence to enforce the execution of this section, and that the said other person had committed the offence in question without his knowledge, consent, or connivance, the said other person shall be summarily convicted of such offence, and the licensee shall be exempt from any penalty.

Any petroleum other than that to which the Petroleum Act, 1871, applies while in any carriage used for the hawking of petroleum to which the Petroleum Act, 1871, applies, shall for the purposes of this section be deemed to be petroleum to which the Petroleum Act, 1871, applies.

Modification of  
conditions of  
licence under  
84 & 85 Vict.  
c. 105.

3. Any conditions annexed to a licence granted in pursuance of the Petroleum Act, 1871, either before or after the passing of this Act, shall, so far as they are inconsistent with this Act, be void, but save as aforesaid nothing in this Act shall affect the application to a licensee of the provisions of the Petroleum Act, 1871, or of any licence granted thereunder.

Power of con-  
stable as to  
prevention of  
offences.

4. Where a constable or any officer authorised by the local authority has reasonable cause to believe that a contravention of this Act is being committed in relation to any petroleum, he may seize and detain such petroleum and the vessels and carriage containing the same, until some court of summary jurisdiction has determined whether there was or not a contravention of this Act, and section thirteen of the Petroleum Act, 1871, shall apply to such constable and officer as if he were the person named in the warrant mentioned in that section, and as if the seizure were a seizure in pursuance of that section.

Saving of  
rights of  
municipal  
boroughs.

5. Nothing in this Act contained shall extend to authorise the hawking of petroleum within the limits of any municipal borough in which, by any lawful authority, such hawking shall have been or may hereafter be forbidden.

Definitions.

6. For the purposes of this Act—

The expression "carriage" includes any carriage, waggon, cart, truck, vehicle, or other means of conveyance by land, in whatever manner the same may be drawn or propelled ; and

A person shall be deemed for the purposes of this Act to hawk petroleum if by himself or his servants he goes about carrying petroleum to sell, whether going from town to town or to other men's houses, or selling it in the streets of the place of his residence or otherwise, and whether with or without any horse or other beast bearing or drawing burden.

## SUPREME COURT OF JUDICATURE ACT, 1881.

44 & 45 Vict.  
c. 68.

44 &amp; 45 VIOT. CAP. 68.

*Supreme Court  
of Judicature  
Act, 1881.**An Act to amend the Supreme Court of Judicature Acts; and for other purposes.—[27th August, 1881.]*

18. The power of making general orders for fixing the times of holding sessions of the Central Criminal Court established by the Act of the fourth and fifth years of King William the Fourth, chapter thirty-six, which, by section fifteen of that Act, was given to any eight or more of the judges of the Superior Courts of Westminster, may henceforth be exercised from time to time by any four or more of the judges of Her Majesty's High Court of Justice.

As to fixing  
sessions of  
Central Crimi-  
nal Court.

## FUGITIVE OFFENDERS ACT, 1881.

44 &amp; 45 VIOT. CAP. 69.

*An Act to amend the Law with respect to Fugitive Offenders in Her Majesty's Dominions, and for other Purposes connected with the Trial of Offenders.—[27th August, 1881.]*

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; (that is to say,)

1. This Act may be cited as "The Fugitive Offenders Act, 1881." Short title.

## PART I.—RETURN OF FUGITIVES.

2. Where a person accused of having committed an offence (to which this part of this Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part), if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive.

Liability of  
fugitive to be  
apprehended  
and returned.

A fugitive may be so apprehended under an indorsed warrant or a provisional warrant.

3. Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive is or is suspected to be; (that is to say,)

Indorsing of  
warrant for  
apprehension  
of fugitive.

(1.) A judge of a superior court in such part; and

(2.) In the United Kingdom a Secretary of State and one of the magistrates of the metropolitan police court in Bow-street; and

(3.) In a British possession the Governor of that possession, if satisfied that the warrant was issued by some person having lawful authority to issue the same, may indorse such warrant in manner provided by this Act, and the warrant so indorsed shall be a sufficient authority to apprehend the fugitive in the part of Her Majesty's dominions in which it is indorsed, and bring him before a magistrate.



44 & 45 VICT.  
c. 69.

*Fugitive  
Offenders  
Act, 1881.*

Provisional  
warrant for  
apprehension  
of fugitive.

Dealing with  
fugitive when  
apprehended.

Return of  
fugitive by  
warrant.

4. A magistrate of any part of Her Majesty's dominions may issue a provisional warrant for the apprehension of a fugitive, who is or is suspected of being in or on his way to that part, on such information, and under such circumstances as would, in his opinion, justify the issue of a warrant if the offence of which the fugitive is accused had been committed within his jurisdiction, and such warrant may be backed and executed accordingly.

A magistrate issuing a provisional warrant shall forthwith send a report of the issue, together with the information, or a certified copy thereof, if he is in the United Kingdom, to a Secretary of State, and, if he is in a British possession, to the governor of that possession, and the Secretary of State or governor may, if he think fit, discharge the person apprehended under such warrant.

5. A fugitive, when apprehended, shall be brought before a magistrate, who (subject to the provisions of this Act) shall hear the case, in the same manner, and have the same jurisdiction and powers, as near as may be (including the power to remand and admit to bail), as if the fugitive were charged with an offence committed within his jurisdiction.

If the indorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act), according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of this Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal, and such report of the case as he may think fit, if in the United Kingdom, to a Secretary of State, and, if in a British possession, to the governor of that possession.

Where the magistrate commits the fugitive to prison, he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus* or other like process.

A fugitive apprehended on a provisional warrant may be from time to time remanded for such reasonable time, not exceeding seven days at any one time, as under the circumstances seems requisite for the production of an indorsed warrant.

6. Upon the expiration of fifteen days after a fugitive has been committed to prison to await his return, or if a writ of *habeas corpus* or other like process is issued with reference to such fugitive by a superior court, after the final decision of the court in the case,

(1.) if the fugitive is so committed in the United Kingdom, a Secretary of State; and

(2.) if the fugitive is so committed in a British possession, the governor of that possession,

may, if he thinks it just, by warrant under his hand order that fugitive to be returned to the part of Her Majesty's dominions from which he is a fugitive, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or some one or more of them, and to be held in custody, and conveyed by sea or otherwise to the said part of Her Majesty's dominions, to be dealt with there in due course of law as if he had been there apprehended, and such warrant shall be forthwith executed according to the tenor thereof.

The governor or other chief officer of any prison, on request of any person having the custody of a fugitive under any such warrant, and on

payment or tender of a reasonable amount of expenses, shall receive such fugitive and detain him for such reasonable time as may be requested by the said person for the purpose of the proper execution of the warrant.

7. If a fugitive who, in pursuance of this part of this Act, has been committed to prison in any part of Her Majesty's dominions to await his return, is not conveyed out of that part within one month after such committal, a superior court, upon application by or on behalf of the fugitive, and upon proof that reasonable notice of the intention to make such application has been given, if the said part is the United Kingdom to a Secretary of State, and if the said part is a British possession to the governor of the possession, may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody.

44 & 45 VICT.  
c. 69.

*Fugitive  
Offenders  
Act, 1881.*

Discharge of  
person apprehended if not  
returned within one month.

8. Where a person accused of an offence and returned in pursuance of this part of this Act to any part of Her Majesty's dominions, either is not prosecuted for the said offence within six months after his arrival in that part, or is acquitted of the said offence, then if that part is the United Kingdom a Secretary of State, and if that part is a British possession the governor of that possession, may, if he think fit, on the request of such person, cause him to be sent back free of cost and with as little delay as possible to the part of Her Majesty's dominions in or on his way to which he was apprehended.

Sending back  
of persons apprehended if  
not prosecuted within six  
months or acquitted.

9. This part of this Act shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanour, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment; and for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour.

Offences to  
which this  
part of this  
Act applies.

This part of this Act shall apply to an offence notwithstanding that by the law of the part of Her Majesty's dominions in or on his way to which the fugitive is or is suspected of being it is not an offence, or not an offence to which this part of this Act applies; and all the provisions of this part of this Act, including those relating to a provisional warrant and to a committal to prison, shall be construed as if the offence were in such last-mentioned part of Her Majesty's dominions an offence to which this part of this Act applies.

10. Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just.

Powers of  
Superior  
Court to discharge  
fugitive when case  
frivolous or  
return unjust.

11. In Ireland the Lord Lieutenant or Lords Justices or other chief governor or governors of Ireland, also the chief secretary of such Lord Lieutenant, may, as well as a Secretary of State, execute any portion of the powers by this part of this Act vested in a Secretary of State.

Power of Lord  
Lieutenant in  
Ireland.

44 &amp; 45 VICT.

c. 69.

*Fugitive  
Offenders  
Act, 1881.*

## PART II.—INTER-COLONIAL BACKING OF WARRANTS, AND OFFENCES.

*Application of part of Act.*

Application of part of Act to group of British possessions. 12. This part of this Act shall apply only to those groups of British possessions to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same.

It shall be lawful for Her Majesty from time to time by Order in Council to direct that this part of this Act shall apply to the group of British possessions mentioned in the Order, and by the same or any subsequent Order to except certain offences from the application of this part of this Act, and to limit the application of this part of this Act by such conditions, exceptions, and qualifications as may be deemed expedient.

*Backing of Warrants.*

Backing in one British possession of warrant issued in another of same group.

13. Where in a British possession of a group to which this part of this Act applies a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that possession, and such person is or is suspected of being in or on the way to another British possession of the same group, a magistrate in the last-mentioned possession, if satisfied that the warrant was issued by a person having lawful authority to issue the same, may indorse such warrant in manner provided by this Act, and the warrant so indorsed shall be a sufficient authority to apprehend, within the jurisdiction of the indorsing magistrate, the person named in the warrant, and bring him before the indorsing magistrate or some other magistrate in the same British possession.

Return of prisoner apprehended under backed warrant.

14. The magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenticated as directed by this Act and was issued by a person having lawful authority to issue the same, and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant, may order such prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or any one or more of them, and to be held in custody and conveyed by sea or otherwise into the British possession in which the warrant was issued, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by warrant under the hand of the magistrate making it, and may be executed according to the tenor thereof.

A magistrate shall, so far as it is requisite for the exercise of the powers of this section, have the same power, including the power to remand and admit to bail a prisoner, as he has in the case of a person apprehended under a warrant issued by him.

Backing in one British possession of summons, &c., of witness issued in another possession of same group.

15. Where a person required to give evidence on behalf of the prosecutor or defendant on a charge for an offence punishable by law in a British possession of a group to which this part of this Act applies, is or is suspected of being in or on his way to any other British possession of the same group, a judge, magistrate, or other officer who would have lawful authority to issue a summons, requiring the attendance of such witness, if the witness were within his jurisdiction, may issue a summons for the attendance of such witness, and a magistrate in any other British possession of the same group, if satisfied that the summons was issued

by some judge, magistrate, or officer having lawful authority as aforesaid, may indorse the summons with his name; and the witness, on service in that possession of the summons so indorsed, and on payment or tender of a reasonable amount for his expenses, shall obey the summons, and in default shall be liable to be tried and punished either in the possession in which he is served or in the possession in which the summons was issued, and shall be liable to the punishment imposed by the law of the possession in which he is tried for the failure of a witness to obey such a summons. The expression "summons" in this section includes any subpoena or other process for requiring the attendance of a witness.

44 & 45 Vict.  
c. 69.

*Fugitive  
Offenders  
Act, 1881.*

16. A magistrate in a British possession of a group to which this part of this Act applies, before the indorsement in pursuance of this part of this Act of a warrant for the apprehension of any person, may issue a provisional warrant for the apprehension of that person, on such information and under such circumstances as would in his opinion justify the issue of a warrant if the offence of which such person is accused were an offence punishable by the law of the said possession, and had been committed within his jurisdiction, and such warrant may be backed and executed accordingly; provided that a person arrested under such provisional warrant shall be discharged unless the original warrant is produced and indorsed within such reasonable time as may under the circumstances seem requisite.

Provisional  
warrant in  
group of  
British pos-  
sessions.

17. If a prisoner in a British possession whose return is authorised in pursuance of this part of this Act is not conveyed out of that possession within one month after the date of the warrant ordering his return, a magistrate or a superior court, upon application by or on behalf of the prisoner, and upon proof that reasonable notice of the intention to make such application has been given to the person holding the warrant and to the chief officer of the police of such possession or of the province or town where the prisoner is in custody, may, unless sufficient cause is shown to the contrary, order such prisoner to be discharged out of custody.

Discharge of  
prisoner not  
returned with-  
in one month  
to British pos-  
session of same  
group.

Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to appeal to a superior court.

18. Where a prisoner accused of an offence is returned, in pursuance of this part of this Act to a British possession, and either is not prosecuted for the said offence within six months after his arrival in that possession, or is acquitted of the said offence, the governor of that possession, if he thinks fit, may, on the requisition of such person, cause him to be sent back, free of cost, and with as little delay as possible, to the British possession in or on his way to which he was apprehended.

Sending back  
of prisoner  
not prosecuted  
or acquitted to  
British pos-  
session of same  
group.

19. Where the return of a prisoner is sought or ordered under this part of this Act, and it is made to appear to a magistrate or to a superior court that, by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period, the court or magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the magistrate or court seems just.

Refusal to  
return pri-  
soner where  
offence too  
trivial.

Any order or refusal to make an order of discharge, by a magistrate under this section shall be subject to an appeal to a superior court.

Appeal.

44 & 45 Vict.  
c. 69.

## PART III.

*Trial, &c., of Offences.*

*Fugitive  
Offenders  
Act, 1881.*

Offences com-  
mitted on  
boundary of  
two adjoining  
British posses-  
sions.

Offences com-  
mitted on  
journey  
between two  
British posses-  
sions.

Trial of offence  
of false swear-  
ing or giving  
false evidence.

Supplemental  
provision as to  
trial of person  
in any place.

37 & 38 Vict.  
c. 27.

Issue of search  
warrant.

Removal of  
prisoner by  
sea from one  
place to  
another.

20. Where two British possessions adjoin, a person accused of an offence committed on or within the distance of five hundred yards from the common boundary of such possessions may be apprehended, tried, and punished in either of such possessions.

21. Where an offence is committed on any person or in respect of any property in or upon any carriage, cart, or vehicle whatsoever employed in a journey, or on board any vessel whatsoever employed in a navigable river, lake, canal, or inland navigation, the person accused of such offence may be tried in any British possession through a part of which such carriage, cart, vehicle, or vessel passed in the course of the journey or voyage during which the offence was committed; and, where the side, bank, centre, or other part of the road, river, lake, canal, or inland navigation along which the carriage, cart, vehicle, or vessel passed in the course of such journey or voyage is the boundary of any British possession, a person may be tried for such offence in any British possession of which it is the boundary:

Provided that nothing in this section shall authorise the trial for such offence of a person who is not a British subject, where it is not shown that the offence was committed in a British possession.

22. A person accused of the offence (under whatever name it is known) of swearing or making any false deposition, or of giving or fabricating any false evidence, for the purposes of this Act, may be tried either in the part of Her Majesty's dominions in which such deposition or evidence is used, or in the part in which the same was sworn, made, given, or fabricated, as the justice of the case may require.

23. Where any part of this Act provides for the place of trial of a person accused of an offence, that offence shall, for all purposes of and incidental to the apprehension, trial, and punishment of such person, and of and incidental to any proceedings and matters preliminary, incidental to, or consequential thereon, and of and incidental to the jurisdiction of any court, constable, or officer, with reference to such offence, and to any person accused of such offence, be deemed to have been committed in any place in which the person accused of the offence can be tried for it; and such person may be punished in accordance with the Courts (Colonial) Jurisdiction Act, 1874.

24. Where a warrant for the apprehension of a person accused of an offence has been indorsed in pursuance of any part of this Act in any part of Her Majesty's dominions, or where any part of the Act provides for the place of trial of a person accused of an offence, every court and magistrate of the part in which the warrant is indorsed, or the person accused of the offence can be tried, shall have the same power of issuing a warrant to search for any property alleged to be stolen or to be otherwise unlawfully taken or obtained by such person, or otherwise to be the subject of such offence, as that court or magistrate would have if the property had been stolen or otherwise unlawfully taken or obtained, or the offence had been committed wholly within the jurisdiction of such court or magistrate.

25. Where a person is in legal custody in a British possession, either in pursuance of this Act or otherwise, and such person is required to be removed in custody to another place in or belonging to the same British possession, such person, if removed by sea in a vessel belonging to Her



Majesty or any of Her Majesty's subjects, shall be deemed to continue in legal custody until he reaches the place to which he is required to be removed; and the provisions of this Act with respect to the retaking of a prisoner who has escaped, and with respect to the trial and punishment of a person guilty of the offence of escaping or attempting to escape, or aiding or attempting to aid a prisoner to escape, shall apply to the case of a prisoner escaping while being lawfully removed as aforesaid, in like manner as if he were being removed in pursuance of a warrant indorsed in pursuance of this Act.

44 & 45 Vict.  
c. 69.

*Fugitive  
Offenders  
Act, 1881.*

#### PART IV.—SUPPLEMENTAL.

##### *Warrants and Escape.*

26. An indorsement of a warrant in pursuance of this Act shall be signed by the authority indorsing the same, and shall authorise all or any of the persons named in the indorsement, and of the persons to whom the warrant was originally directed, and also every constable, to execute the warrant within the part of Her Majesty's dominions or place within which such indorsement is by this Act made a sufficient authority, by apprehending the person named in it, and bringing him before some magistrate in the said part or place, whether the magistrate named in the indorsement or some other.

Indorsement  
of warrant.

For the purposes of this Act every warrant, summons, subpoena, and process, and every indorsement made in pursuance of this Act thereon, shall remain in force, notwithstanding that the person signing the warrant or such indorsement dies or ceases to hold office.

27. Where a fugitive or prisoner is authorised to be returned to any part of Her Majesty's dominions in pursuance of Part One or Part Two of this Act, such fugitive or prisoner may be sent thither in any ship belonging to Her Majesty or to any of her subjects.

Conveyance  
of fugitives  
and witnesses.

For the purpose aforesaid, the authority signing the warrant for the return may order the master of any ship belonging to any subject of Her Majesty bound to the said part of Her Majesty's dominions to receive and afford a passage and subsistence during the voyage to such fugitive or prisoner, and to the person having him in custody, and to the witnesses, so that such master be not required to receive more than one fugitive or prisoner for every hundred tons of his ship's registered tonnage, or more than one witness for every fifty tons of such tonnage.

The said authority shall indorse or cause to be indorsed upon the agreement of the ship such particulars with respect to any fugitive prisoner or witness sent in her as the Board of Trade from time to time require.

Every such master shall, on his ship's arrival in the said part of Her Majesty's dominions, cause such fugitive or prisoner, if he is not in the custody of any person, to be given into the custody of some constable, there to be dealt with according to law.

Every master who fails on payment or tender of a reasonable amount for expenses to comply with an order made in pursuance of this section, or to cause a fugitive or prisoner committed to his charge to be given into custody as required by this section, shall be liable on summary conviction to a fine not exceeding fifty pounds, which may be recovered in any part of Her Majesty's dominions in like manner as a penalty of the same amount under the Merchant Shipping Act, 1854, and the Acts amending the same.

17 & 18 Vict.  
c. 104.

28. If a prisoner escape, by breach of prison or otherwise, out of the custody of a person acting under a warrant issued or indorsed in pursuance of this Act, he may be retaken in the same manner as a person



44 & 45 VICT. c. 69. accused of a crime against the law of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

*Fugitive  
Offenders  
Act, 1881.*

Escape of  
prisoner from  
custody.

A person guilty of the offence of escaping or of attempting to escape, or of aiding or attempting to aid a prisoner to escape, by breach of prison or otherwise, from custody under any warrant issued or indorsed in pursuance of this Act, may be tried in any of the following parts of Her Majesty's dominions, namely, the part to which and the part from which the prisoner is being removed, and the part in which the prisoner escapes, and the part in which the offender is found.

*Evidence.*

Depositions  
to be evidence,  
and authen-  
tication of  
depositions  
and warrants.

29. A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him.

Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act.

Provided that nothing in this Act shall authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence.

Warrants and depositions, and copies thereof, and official certificates of or judicial documents stating facts, shall be deemed duly authenticated for the purposes of this Act if they are authenticated in manner provided for the time being by law, or if they purport to be signed by or authenticated by the signature of a judge, magistrate, or officer of the part of Her Majesty's dominions in which the same are issued, taken, or made, and are authenticated either by the oath of some witness, or by being sealed with the official seal of a Secretary of State, or with the public seal of a British possession, or with the official seal of a governor of a British possession, or of a colonial secretary, or of some secretary or minister administering a department of the government of a British possession.

And all courts and magistrates shall take judicial notice of every such seal as is in this section mentioned, and shall admit in evidence without further proof the documents authenticated by it.

*Miscellaneous.*

Provision as  
to exercise of  
jurisdiction by  
magistrates.

30. The jurisdiction under Part One of this Act to hear a case and commit a fugitive to prison to await his return shall be exercised,—

- (1.) In England, by a chief magistrate of the metropolitan police courts, or one of the other magistrates of the metropolitan police court at Bow-street; and
- (2.) In Scotland, by the sheriff or sheriff substitute of the county of Edinburgh; and
- (3.) In Ireland, by one of the police magistrates of the Dublin metropolitan police district; and
- (4.) In a British possession, by any judge, justice of the peace, or other officer having the like jurisdiction as one of the magistrates of the metropolitan police court in Bow-street, or by such other court, judge, or magistrate as may be from time to time provided by an Act or ordinance passed by the Legislature of that possession.

If a fugitive is apprehended and brought before a magistrate who has no power to exercise the jurisdiction under this Act in respect of that fugitive, that magistrate shall order the fugitive to be brought before some magistrate having that jurisdiction, and such order shall be obeyed.

44 & 45 Vict.  
c. 69.

*Fugitive  
Offenders  
Act, 1881.*

31. It shall be lawful for Her Majesty in Council from time to time to make Orders for the purposes of this Act, and to revoke and vary any Order so made, and every Order so made shall, while it is in force, have the same effect as if it were enacted in this Act.

Power as to  
making and  
revocation of  
Orders in  
Council.

An Order in Council made for the purposes of this Act shall be laid before Parliament as soon as may be after it is made if Parliament is then in session, or if not, as soon as may be after the commencement of the then next session of Parliament.

32. If the Legislature of a British possession pass any Act or ordinance—

Power of  
legislature of  
British posses-  
sion to pass  
laws for carry-  
ing into effect  
this Act.

(1.) For defining the offences committed in that possession to which this Act or any part thereof is to apply; or

(2.) For determining the court, judge, magistrate, officer, or person by whom and the manner in which any jurisdiction or power under this Act is to be exercised; or

(3.) For payment of the costs incurred in returning a fugitive or a prisoner, or in sending him back if not prosecuted or if acquitted, or otherwise in the execution of this Act; or

(4.) In any manner for the carrying of this Act or any part thereof into effect in that possession,

it shall be lawful for Her Majesty by Order in Council to direct, if it seems to Her Majesty in Council necessary or proper for carrying into effect the objects of this Act, that such Act or ordinance, or any part thereof, shall, with or without modification or alteration, be recognised and given effect to throughout Her Majesty's dominions and on the high seas as if it were part of this Act.

#### *Application of Act.*

33. Where a person accused of an offence can, by reason of the nature of the offence, or of the place in which it was committed, or otherwise, be, under this Act or otherwise, tried for or in respect of the offence in more than one part of Her Majesty's dominions, a warrant for the apprehension of such person may be issued in any part of Her Majesty's dominions in which he can, if he happens to be there, be tried; and each part of this Act shall apply as if the offence had been committed in the part of Her Majesty's dominions where such warrant is issued, and such person may be apprehended and returned in pursuance of this Act, notwithstanding that in the place in which he is apprehended a court has jurisdiction to try him:

Application of  
Act to offences  
at sea or  
triable in  
several parts  
of Her  
Majesty's  
dominions.

Provided that if such person is apprehended in the United Kingdom a Secretary of State, and if he is apprehended in a British possession, the governor of such possession, may, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, order such person to be tried in the part of Her Majesty's dominions in which he is apprehended, and in such case any warrant previously issued for his return shall not be executed.

34. Where a person convicted by a court in any part of Her Majesty's

Application of  
Act to con-  
victs.

44 & 45 VICT. dominions of an offence committed either in Her Majesty's dominions  
 c. 69. or elsewhere, is unlawfully at large before the expiration of his sentence,  
*Fugitive* each part of this Act shall apply to such person, so far as is consistent  
*Offenders* with the tenor thereof, in like manner as it applies to a person accused  
*Act, 1881.* of the like offence committed in the part of Her Majesty's dominions  
 in which such person was convicted.

Application of 35. Where a person accused of an offence is in custody in some part  
 Act to removal of person of Her Majesty's dominions, and the offence is one for or in respect of  
 triable in more than one committed or otherwise, a person may under this Act or otherwise be  
 part of Her Majesty's tried in some other part of Her Majesty's dominions, in such case a  
 dominions. superior court, and also if such person is in the United Kingdom a  
 Secretary of State, and if he is in a British possession the governor of  
 that possession, if satisfied that, having regard to the place where the  
 witnesses for the prosecution and for the defence are to be found, and  
 to all the circumstances of the case, it would be conducive to the  
 interests of justice so to do, may by warrant direct the removal of such  
 offender to some other part of Her Majesty's dominions in which  
 he can be tried, and the offender may be returned, and, if not prosecuted  
 or acquitted, sent back free of cost in like manner as if he were a fugitive  
 returned in pursuance of Part One of this Act, and the warrant were a  
 warrant for the return of such fugitive, and the provisions of this Act  
 shall apply accordingly.

Application of 36. It shall be lawful for Her Majesty from time to time by Order  
 Act to foreign in Council to direct that this Act shall apply as if, subject to the  
 jurisdiction. conditions, exceptions, and qualifications (if any) contained in the Order,  
 any place out of Her Majesty's dominions in which Her Majesty has  
 jurisdiction, and which is named in the order, were a British possession,  
 and to provide for carrying into effect such application.

Application of 37. This Act shall extend to the Channel Islands and Isle of Man  
 Act to and as if they were part of England and of the United Kingdom, and the  
 execution of United Kingdom and those islands shall be deemed for the purpose of  
 warrant in this Act to be one part of Her Majesty's dominions; and a warrant  
 United King- indorsed in pursuance of Part One of this Act may be executed in  
 dom, Channel every place in the United Kingdom and the said islands accordingly.  
 Islands, and Isle of Man.

Application of 38. This Act shall apply where an offence is committed before the  
 Act to past commencement of this Act, or in the case of Part Two of this Act, before  
 offences. the application of that part to a British possession or to the offence, in  
 like manner as if such offence had been committed after such commence-  
 ment or application.

#### *Definitions and Repeal.*

Definition of 39. In this Act, unless the context otherwise requires,—  
 terms. The expression "Secretary of State" means one of Her Majesty's  
 "Secretary of Principal Secretaries of State :

"State :"  
 "British pos- The expression "British possession" means any part of Her Majesty's  
 session :"  
 dominions, exclusive of the United Kingdom, the Channel Islands,  
 and Isle of Man; all territories and places within Her Majesty's  
 dominions which are under one legislature shall be deemed to be  
 one British possession and one part of Her Majesty's dominions :

"Legisla- The expression "legislature," where there are local legislatures as well  
 ture :"  
 as a central legislature, means the central legislature only :

"Governor :"  
 The expression "governor" means any person or persons administering  
 the government of a British possession, and includes the governor  
 and lieutenant-governor of any part of India :

The expression "constable" means, out of England, any policeman or officer having the like powers and duties as a constable in England : 44 & 45 Vict. c. 69.

The expression "magistrate" means, except in Scotland, any justice of the peace, and in Scotland means a sheriff or sheriff substitute, and in the Channel Islands, Isle of Man, and a British possession means any person having authority to issue a warrant for the apprehension of persons accused of offences and to commit such persons for trial : *Fugitive Offenders Act, 1881.*  
"Constable :"  
"Magistrate :"

The expression "offence punishable on indictment" means, as regards India, an offence punishable on a charge or otherwise : "Offence punishable on indictment :"

The expression "oath" includes affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swearing, and the expression "swear" and other words relating to an oath or swearing shall be construed accordingly : "Oath :"

The expression "deposition" includes any affidavit, affirmation, or statement made upon oath as above defined : "Deposition :"

The expression "Superior Court" means : "Superior Court :"

- (1.) In England, Her Majesty's Court of Appeal and High Court of Justice ; and
- (2.) In Scotland, the High Court of Justiciary ; and
- (3.) In Ireland, Her Majesty's Court of Appeal and Her Majesty's High Court of Justice at Dublin ; and
- (4.) In a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court of Justice in England, or such court or judge as may be determined by any Act or ordinance of that possession.

40. This Act shall come into operation on the first day of January Commence- one thousand eight hundred and eighty-two, which date is in this Act ment of Act. referred to as the commencement of this Act.

41. The Act specified in the schedule to this Act is hereby repealed as Repeal of Act from the commencement of this Act : in schedule.

Provided that this repeal shall not affect—

- (a.) Any warrant duly indorsed or issued, nor anything duly done or suffered before the commencement of this Act ; nor
- (b.) Any obligation or liability incurred under an enactment hereby repealed ; nor
- (c.) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed ; nor
- (d.) Any legal proceeding or remedy in respect of any such warrant, obligation, liability, penalty, forfeiture, or punishment as afore- said ; and any such warrant may be indorsed and executed, and any such legal proceedings and remedy may be carried on, as if this Act had not passed.

SCHEDULE.

Year and Chapter.	Title.
6 & 7 Vict. c. 84.	An Act for the better apprehension of certain offenders.



# INDEX.

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## ACCESSORY.

(See PRACTICE.)

An accessory before the fact must be absent at the commission of the crime, for if present he becomes a principal. *Reg. v. Brown.* 144.

## AGENT.

*Fraudulent conversion of property.* — The prisoner was an agent employed to sell goods on commission, and as soon as he received moneys from customers he was to remit them to his employers. During the employment the prosecutor wrote to the prisoner, "We will send H. B. and P. their bills at the end of the month, and the same day that you receive the money from the customers you must remit it to us. We will attend to your order, as our arrangements were to remit as soon as you received it, as you said they would not pay much before the 20th of each month." Held, that this letter was not a direction in writing as to the application or disposition of moneys received by the prisoner within 24 & 25 Vict. c. 96, s. 75. *Reg. v. Brownlow.* 216.

Trust money had been invested on mortgage. The mortgage was paid off, and the money left in the hands of the family solicitor, who wrote to the person beneficially interested, "R.'s money was paid on Saturday, 6th April, 2500*l.* and interest. . . . Let me know how you would like to have the 2500*l.* invested, whether in the funds or on mortgage. I can get you 4 per cent. on a good security, but not more. More than 4 per cent. is not to be obtained upon such securities as trustees would be justified in investing in." The answer was dated the 9th April, "Will consult C. at once about the money and let you know. I do not wish it placed in the funds. I am very glad it is paid over, and hope it will be well secured this time." At or very near the date of these letters it was clear that the money had

been fraudulently appropriated to his own use by the solicitor. Held, that this was a fraudulent conversion to his own use of property intrusted to the solicitor for safe custody within sect. 76 of 24 & 25 Vict. c. 95. *Reg. v. Fullagar.* 370.

## AMENDMENT.

(See PRACTICE.)

On objection before plea to the first count of the indictment that the words "a certain woman" were too vague, an amendment was allowed by inserting the words "to the jurors unknown," and striking out the word "certain." *Reg. v. Titley.* 502.

## ASSAULT.

In an action of assault it was proved that defendant, who was infected with venereal disease, had sexual connection with the plaintiff with her consent, concealing from her the fact that he was diseased. The plaintiff becoming in consequence diseased, brought an action of assault. Held, that the action could not be sustained. *Hegarty v. Shine.* 124; on appeal, 145.

Alimony ordered by a magistrate on a conviction for an aggravated assault may be appealed against to the Divorce Court. *Grove v. Grove.* 200.

The appellants while in fresh pursuit of a fox came to land managed by respondent for his father. The respondent warned them off, and endeavoured to prevent their going upon the land. The appellants thereupon attempted to force an entry, and in so doing committed an assault, for which they were convicted and fined. Held, that the conviction was right, as foxhunting was no justification of trespass. *Paul v. Summerhayes.* 202.

## ATTACHMENT.

Informations for conspiracy having been exhibited against persons for exciting



tenants not to pay rents, and not to deal with tenants who had paid rents, and divers similar offences, a newspaper commented hostilely on the conduct of the traversers and their party in keeping up the agitation, which formed the subject-matter of the accusation against them. On motion for an attachment against the proprietors of the newspaper, it was held that an attachment should issue, but costs were refused on the ground of the conduct of the traversers. *Reg. v. Parnell and others.* 474.

### BAIL.

Defendants, who were members of an extensive organisation, were accused of a riot arising out of the agitation created by the organisation, and bail was refused by the local magistrates. Held, that the refusal was right, considering (1) the serious nature of the offence charged; (2) the probability of the association furnishing funds to indemnify the bail. *Reg. v. Butler.* 530.

A contract to indemnify bail against the consequences of the non-appearance of an accused is contrary to public policy and illegal. The defendant became bail in 100*l.* for M. under a charge of embezzlement. M. paid 100*l.* to the defendant to indemnify him for becoming bail, and then absconded. Held, that M.'s trustee in bankruptcy was entitled to recover that sum from the defendant. *Wilson v. Strugnell.* 624.

### BANKRUPTCY.

(See DEBTORS ACT.)

A convicted felon may be adjudicated a bankrupt on an act of bankruptcy committed either before or after his conviction. If a debtors summons be served on a convicted felon during his imprisonment his neglect to pay, secure, or compound for, the debt will be an act of bankruptcy. *Ex parte Graves.* 629.

A banker's clerk embezzled money and absconded. The banker did not apply for a warrant for his apprehension until ten days after he discovered the embezzlement. The clerk had then escaped, and was never prosecuted. He was then adjudicated a bankrupt in his absence, and the trustee rejected the banker's proof for the amount embezzled. Upon appeal the

chief judge in bankruptcy ordered the proof to be admitted on the ground that the banker had used due diligence in endeavouring to prosecute the bankrupt. This decision was affirmed in the Court of Appeal, James and Bramwell L.JJ. holding that though the banker might not have been entitled to prove for a debt arising out of felony in respect of which he had not prosecuted the felon (which *quære*) the obligation of prosecuting the felon was a personal one, and did not extend to the trustee in the banker's liquidation, the banker having liquidated: and Baggallay, L.J. and Bacon, C.J. holding that the rule which prevents an injured person from obtaining civil redress for a criminal wrong if he has failed in his duty of bringing the felon to justice does not apply when the prosecution has become impossible by the felon's escape before he could have been prosecuted by the exercise of reasonable diligence. *Ex parte Ball, Re Shepherd.* 237.

An infant trader quitted England, and whilst abroad a petition was filed upon which he was adjudged a bankrupt. He was arrested, brought to England, indicted and convicted for having feloniously within four calendar months before the presentation of the bankruptcy petition quitted England, and taken with him 20*l.* and upwards which ought by law to have been divided amongst his creditors, with intent to defraud (32 & 32 Vict. c. 62, s. 12): Held, that the conviction could not be sustained, as the debts of the creditors who proved were void by the Infants Relief Act, 1874, none of them being for necessities. *Reg. v. Wilson.* 378.

### BARRISTER.

A statement of claim for damages set forth that the plaintiff, being returned for trial on a criminal charge, entered into a special contract with defendant a barrister to defend him at the trial, and attend on each day of the trial, and the defendant was paid a special fee larger than the ordinary fee or honorarium paid to counsel for so attending, yet that the defendant neglected to attend the trial after the first day of the trial by reason whereof the plaintiff was convicted, and suffered damage. On demurrer, it was held that the claim was bad, as no valid contract can be entered into between barrister and client. *Robertson v. McDonagh.* 469.

# BIGAMY.

*Absence for seven years—Bonâ fide belief of death.*—On the trial of an indictment for bigamy evidence is not admissible to show that the prisoner honestly believed that his first wife was dead, when he married a second time within seven years of his last having heard of or seen his first wife. *Semble*, however reasonable such a belief may be, it can only be used in mitigation of punishment after conviction. *Reg. v. J. C. Bennett. Bramwell, L.J. 45.*

In a case of bigamy a marriage contracted according to the rites of the Roman Catholic Church in a foreign state is presumed to be good without proof of the law of that foreign state relating to marriage. *Reg. v. P. Griffin. 308.*

In 1864 prisoner married E. In 1868 prisoner was indicted and convicted for marrying A., his wife E. being then alive. In 1879 prisoner married B., and in 1880 he married C. Prisoner was indicted for marrying C. in 1880, his wife B. alleged to be then alive, and upon the trial the prisoner proved by a witness and the production of the record of the trial in 1868 that his wife E. was then in 1868 alive. The judge at the trial in 1880 ruled that there was no evidence that E. was alive in 1879 when the prisoner married B., and that the prisoner was bound to show that E. was then alive to entitle him to an acquittal. Held, that the question was one for the jury whether E. was alive or dead in 1879 at the time of the last marriage, and that the conflicting presumptions of the continuance of the life of E. after 1868 there being no evidence to the contrary, and of the prisoner being innocent and free to contract the marriage in 1879 were evidence for the jury to consider in determining the question. *Reg. v. Willshire. 541.*

# BREACH OF THE PEACE.

A tract distributor followed two Roman Catholic priests in a street and handed them a bill inviting them to a discussion on religious matters, and persisted in holding up the bill to them after he had been informed that they were Roman Catholic priests: Held that such conduct was making use of threatening, abusive, or insulting language, or behaviour which might provoke a breach

of the peace, and a *certiorari* was refused to bring up a conviction in such a case for the purpose of quashing it. *Reg. v. King. 434.*

# BURIAL GROUND.

The defendant employed men to excavate for building purposes in the unconsecrated burial ground of a Nonconformist place of worship, which ground had been disused for some time, and the jury found that in the course of the excavations bones that formed parts of human remains and of the same human skeleton were dug up, but that they were not disturbed in an improper and indecent manner. Held, that defendant was guilty of a misdemeanour at common law. *Reg. v. Jacobson. 522.*

# COINING.

The prisoner was convicted of uttering two false and counterfeit sovereigns with guilty knowledge. The two sovereigns were originally genuine, but had been reduced in weight by filing off nearly all the original milling. New millings were then made to them fraudulently so as to make them resemble genuine sovereigns. Held, that the two sovereigns when passed in that state were false and counterfeit coins within sect. 9 of 24 & 25 Vict. c. 99; per Lord Coleridge, C.J., Pollock, B., and Huddleston, B. (Lush and Stephens, JJ. dissenting). *Reg. v. Hermann. 279.*

# CONFESSION.

(See EVIDENCE.)

# CONSIDERATION FOR ABANDONING CRIMINAL PROCEEDINGS.

In an action on a bill of exchange the defence alleged that the bill sued upon had been accepted by defendant in consideration of the plaintiff abandoning certain civil bill proceedings pending against S. for the recovery of a previous bill which the plaintiff asserted had been forged by S., and forbearing to proceed criminally for the alleged forgery. Held (on demurrer), that the defence was bad as no criminal proceedings had actually been commenced, nor was there any reasonable or probable cause for believing a criminal act to have been committed. *Bourke v. Mealey. 329.*

A. having been arrested at the instance of B.

on a charge of larceny as a bailee was brought before a magistrate and remanded. A.'s wife then induced B. to withdraw from the prosecution, she agreeing to charge her separate estate with the amount taken. The title deeds of her property were deposited in the joint names of the solicitors of the parties. The prosecution was then abandoned with the consent of the magistrate. A.'s wife afterwards refused to perform her agreement. B. brought an action to enforce the agreement to charge, and A.'s wife counter-claimed for a declaration that she was entitled to have the deeds delivered up to her. Held, that the agreement was illegal, and that A.'s wife was entitled to have the deeds restored to her. *Whitmore v. Farley*. 617.

### CONSPIRACY.

A. obtained goods on credit at B.'s suggestion, in order that A. might sell them to B. below their value, B. aiding A. as a referee and giving him a character. The evidence was such that B. must have known that A. was getting the goods without the intention of paying for them. Held, that B. was guilty of conspiring with A. to defraud. *Reg. v. Osman and Barber*. 881.

The term "conspiracy" is divisible into three heads: (1) Where the end to be attained is in itself a crime; (2) Where the object is lawful but the means to be resorted to are unlawful; (3) Where the object is to do an injury to a third party or a class, though if the wrong were done by an individual it would be a wrong and not a crime. *Reg. v. Parnell*. 508.

### CONTEMPT OF COURT.

A solicitor while practising at a Petty Sessions Court persisted in interrupting the bench by shouting and conducting himself in a disorderly manner and was in consequence committed to gaol for seven days. Held, that the warrant of committal need not be headed with the title of the case which was at hearing when the offence took place; that the offence need not be stated in the committal part of the warrant provided it appeared on the face of the warrant; that the warrant need not state the date from which the imprisonment is to commence, such period commencing from the date of the warrant. Semble, that the

alleged offence should have been stated to the offender before the order for his committal was made, and an opportunity given to him to show cause against it. *Re John Rea*. 189.

A solicitor who had been guilty of conduct amounting to a contempt of court was committed by magistrates sitting at petty sessions to gaol for a week. The warrant of committal stated that he had been offered an opportunity of showing cause why he should not be committed for contempt of court, but that instead of doing so he proceeded to interrupt the proceedings of the court. Held, that on *habeas corpus* affidavits could not be used to show that this statement in the warrant was false. *Re John Rea*. 256.

### CONVEYANCE OF PRISONERS TO PRISON (COST OF).

A police constable obtained from a justice an order upon the county treasurer under 27 Geo. 2, c. 3, s. 1, and 11 & 12 Vict. c. 42, s. 26, for the expenses of conveying two prisoners (one summarily convicted and the other committed for trial) from the police court to the prison. The County Treasurer refused payment on the ground that these expenses were to be defrayed by the Treasury under the Prison's Act, 1877. Held, that the county was liable for these expenses. *Mullins v. Treasurer of the County of Surrey*. 413. Reversed on appeal 534; reversal affirmed by H. of L. (See *post*, vol. XV.)

### CRIMINAL INTENT.

(See EVIDENCE—MALICIOUS INJURY TO PERSON—MONEY PAID.)

The belief, though erroneous, of prisoner in the existence of a right to do the act complained of (setting fire to furze to improve the growth of the grass) excludes criminality. *Reg. v. Twose*. 527.

The prisoner was charged with having thrown her child into the water with intent to drown, &c., under s. 14 of 24 & 25 Vict. c. 100. Held, necessary to prove that the prisoner had the will and intention at the time to kill the child. *Reg. v. Dart*. 148.

### CRIMINAL LUNATICS.

In 1862 a wife, after living with her husband without pauper relief for more than three

years in the appellants' union, was acquitted on the ground of insanity on a charge of attempting to murder her child. Her husband's last legal settlement was then elsewhere, but he continued to live in the appellants' union, and in 1877 an order for her maintenance upon the authority of *Reg. v. Stepney Union* (L. Rep. 9 Q. B. 883) was made upon the appellants. Held that the order was rightly made, not on the husband's last legal settlement at the time of her detention, but upon the appellant union under the 39 & 40 Vict. c. 61, s. 34. *Barton Regis Union v. Berkshire*. 173.

### CRUELTY TO ANIMALS.

Cruelty to an animal to be within 12 & 13 Vict. c. 92, s. 2, must cause substantial and unnecessary suffering to the animal. Without evidence of such suffering, to keep parrots for a few hours without water is not an act of cruelty within the statute. Without evidence to that effect young parrots are not domestic animals within the statute. *Swan v. Saunders*, 566.

### DEBTORS ACT, 1869.

*Indictment — Aider by verdict — Obtaining credit by false pretences and fraudulently disposing of goods within four months before liquidation—*32 & 33 Vict. c. 62, s. 11, sub.-ss. 14, 15.—An indictment charged that the defendant, a trader, "did within four months next before the liquidation by arrangement of his affairs obtain from W. goods upon credit under the false pretence, &c., with intent to defraud." And in another count in similar terms the defendant was charged with unlawfully disposing of the goods otherwise than in the ordinary way of his trade. Both counts were framed under sect. 11, sub.-ss. 14, 15, of 32 & 33 Vict. c. 62. Held, that the counts were good after verdict and sufficiently averred that the defendant was a person whose affairs were liquidated by arrangement within the meaning of sect. 11. *Reg. v. Knight*. 31.

The 32 & 33 Vict. c. 62, s. 11, sub-s. 1, enacts that a bankrupt or liquidating debtor shall be guilty of misdemeanour, "if he does not to the best of his knowledge and belief fully and truly discover to the trustee of his estate all his property, real and personal," &c. Held, that the disclosure is not restricted to

property in possession of the bankrupt at the commencement of his bankruptcy. *Reg. v. Michell*. 490.

### DELIRIUM TREMENS.

Drunkenness is no excuse, but delirium tremens caused by drinking, and differing from drunkenness, if it produces such a degree of madness even for a time as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility. *Reg. v. Davis*. 563.

### EMBEZZLEMENT.

*Wild rabbits—Taking, killing, and removing—One continuous action.*—The prisoner was employed to look after a wood in which the game and rabbits and right of sporting had been granted to his master by the owner. He was not at liberty to kill rabbits for his own use; but he did take, kill, remove, and sell eighteen rabbits, in and from the wood nevertheless. The taking, killing, removing, and selling were parts of one continuous action. Held that the criminal offence (if any) was not embezzlement. *Reg. v. Read*. 17.

*Jurisdiction—Venue—Receipt of money in one county—Fraudulent representation of non-receipt made by letter received in another county.*—It was the prisoner's duty as a country traveller to collect moneys and remit them at once to his employers. On the 18th day of April he received money in county Y.; on the 19th and 20th he wrote to his employers from Y., not mentioning that he had received the money. On the 21st he wrote to them again from Y., by that letter intending them to believe that he had not received the money. The letters were addressed to and received by his employers in county M., but posted in county Y. Held (*Huddleston, B. dissentiente*) that the prisoner might be tried in county M. for the offence of embezzling the money. *Reg. v. Rogers*. 22.

### EVIDENCE.

(See MONEY PAID.)

*Reading the deposition of a witness unable to travel.*—It was proposed to read on the trial at the assizes the deposition of a witness called before the committing

magistrates, then absent by reason of pregnancy. Evidence given by a doctor on the 5th day of February that he had last seen the witness on the 29th day of January, and that she was then daily expecting her confinement, but which had not yet taken place, was held to be sufficient to entitle the deposition to be read at the trial on the 5th day of February. *Reg. v. Heesom.* Lush, J. 40.

A witness who resided fifteen miles from the place of trial was in expectation of her confinement, and on the morning of the trial was unable to move about without considerable difficulty; and was then lying down and had been so for the greater part of the week, though able to get up for a few minutes at intervals. She thought her confinement might not take place until the middle of the following week, but might also occur at any hour. No medical evidence was given. The presiding judge having admitted her deposition on the ground that she was so ill as to be unable to travel within the meaning of 11 & 12 Vict. c. 42, s. 17, the Court of Criminal Appeal upheld the decision. *Reg. v. Wellings.* 105.

Pregnancy alone may be ground for the admission of a witness's deposition. *Reg. v. Goodfellow.* 326.

*Evidence of guilty intent in murder.*—Upon an indictment for murder by poison of S. in October, 1877, evidence is admissible of the previous and subsequent deaths of J. and L., under like circumstances and from similar symptoms, to show that the poisoning was not accidental. And when it is proved that a motive for the death of S. might exist by the fact of the prisoner having insured the life of S. in a benefit and insurance society, evidence may also be given upon the same indictment that there might be an equal motive for the deaths of J. and L. by showing that they also were each of them insured by the prisoner in the same or kindred societies. *Reg. v. Heesom.* Lush, J. 40.

*Declaration by deceased.*—On a trial for murder, the death having been caused by cutting the throat, all the vessels and arteries having been severed, and death therefore certain to ensue, and in fact ensuing almost immediately afterwards, a declaration having been made by deceased in writing about five minutes before death, it was held by Denman, J.

after consulting Cockburn, C.J., that the declaration was admissible. *Reg. v. Morgan.* 337.

On an indictment for murder it was proved that the deceased, with her throat cut through, came suddenly out of a room in which she left the prisoner, who also had his throat cut and was speechless, and that she said something immediately after coming out of the room, and a few minutes before she died. Held that her statement was not admissible either as a dying declaration or as part of the *res gestæ*. *Reg. v. Bedingfield.* 341.

A declaration made under a belief of impending death was held admissible in evidence, even though the declarant, at a later period of the day, took a more cheerful view of her position, and thought that she should recover. *Reg. v. Hubbard,* 565:

*Police report.*—A report of the French police to the Criminal Investigation Department in London stigmatising the prosecutor and his associates as swindlers and card sharpers, a copy of which was read by the defendant to a friend of the prosecutor's before the libel was published, as the materials upon which the libel was founded. Held admissible, not as proof of the facts stated, but under the general issue. *Reg. v. Labouchere.* 419.

*Letters of prisoner's solicitor.*—A letter written by a solicitor for a client making a claim for a lost parcel alleged to contain valuable articles is not inadmissible on the ground of privilege in a criminal case. In order to make a client criminally responsible for a letter written by his solicitor it must be shown that the letter was written in pursuance of the instructions of the client. A letter written by a solicitor in consequence of an interview with his client is not equivalent to a letter written by the instructions of his client and is not admissible in a criminal case against the client. *Reg. v. Downer.* 486.

*Cross-examination and rebutting evidence.*—On a trial for murder a witness who swore that he identified the prisoner as one of the persons who committed the murder was cross-examined as to a conversation which he had shortly after the commission of the crime, and the witness denied that he then said that the prisoner was not the guilty party. The prisoner, for his de-



fence, called A. and B., who were present at the alleged conversation, to contradict the witness. The Crown was thereupon allowed to call C. and D. to corroborate the witness and contradict A. and B. A witness, who identified the prisoner, had a conversation with E., a police-constable, shortly after the commission of the crime. E. was examined on behalf of the prisoner, and said that the witness had stated to him that he could not recognise any of the murderers as they were masked. On cross-examination E. said he had made a report to his superior officers. The Crown was not allowed to call E.'s superior officers to contradict him as to the fact of his having made such a report to them. *Reg. v. Whelan.* 595.

*Admissibility of confession.*—Previously to being given in charge the prisoner was taken into a room where the prosecutor and an inspector of police were. The prosecutor then said to the prisoner: "He (meaning the police-inspector) tells me you are making house-breaking implements; if that is so you had better tell the truth, it may be better for you." The prisoner then made admissions which contributed materially to his conviction for larceny. Held, that these admissions were inadmissible in evidence after the inducement held out, "it may be better for you." *Reg. v. Fennell.* 607.

The prisoner, while in the custody of a policeman on a charge of arson, said to her mistress, "If you forgive me, I will tell you the truth." Her mistress answered, "Ann, did you do it?" The prisoner thereupon made a statement. Held, that the statement thus made was inadmissible against the prisoner. *Reg. v. Mansfield.* 639.

### EXTRADITION.

Under the Extradition Treaty of 1843 with Great Britain, a person surrendered to the United States, by virtue of its provisions, cannot be tried upon a charge different from that for which he was extradited, and for which his surrender could not have been demanded. *Commonwealth v. Hawes.* 135.

Under a warrant issued on the 12th day of November, by the Chief Magistrate at Bow-street, for apprehension of T., a French subject, charging him with "the commission of crimes against bankruptcy

within the jurisdiction of the Swiss Confederation." T. was taken in London on the 18th of November and remanded by the magistrate to the 25th, and then to the 29th of November for further inquiry. On the 26th of Nov. a rule *nisi* was obtained on the ground that the warrant did not set forth the nature of the offence, and otherwise was not good. On the 26th of November a fresh warrant, charging the offence more specifically, was issued and lodged with the gaoler, but was not known to or seen by prisoner's counsel until the rule came on for argument. Held, by Kelly, C.B. and Huddleston, B. discharging the rule, that the description of the offence charged in the warrant of the 12th of November, being in the words of the Extradition Acts, 1870 and 1873, was sufficiently specific and the warrant good. Per Kelly, C.B.: If the case had depended on the warrant of the 26th of November it would have been a violation of the first principles of the law to decide it until the prisoner's counsel had first seen the warrant, and had had an opportunity of preparing to argue upon it. Per Huddleston, B., *contra*: In practice and on authority, a second warrant might be lodged and substituted for the original warrant, and the whole case, and the validity of the second warrant argued whether the second warrant was issued before or after the rule *nisi* was obtained. Prisoner's counsel cannot claim a right to see the warrant. *Re Terraz.* 153.

### FALSE IMPRISONMENT.

*Computation of term of imprisonment.*—The plaintiff, who had been sentenced, on the 31st day of October, to two different terms of imprisonment on two convictions, the first for one calendar month, the second, for fourteen days, to commence at the expiration of the imprisonment previously adjudged, sued the governor of the prison for false imprisonment. The plaintiff was received into the defendant's custody on the 31st day of October and released on the 14th day of December at 9 a.m. Held, that the facts disclosed no cause of action, the term of imprisonment not strictly expiring until midnight on the 14th December. "One calendar month," in a sentence of imprisonment, means a period expiring on that day in the succeeding month which corresponds numerically with the day on which the sentence is pronounced. *Nigotti v. Colville.* 263-305.



FALSE PRETENCES.

*Indictment—Aider by verdict.*—K. was indicted "for that he did falsely pretend that he the said K. was one G. who had moneys deposited in the C. Savings Bank, and who had a book of the said bank, with a statement of his account in it, which book he the said K. presented to the cashier of the bank at the time he represented himself to be the said G., by means of which said false pretence the said K. obtained moneys, &c.; whereas K. was not the person so named in the said savings bank book, nor had he any authority then or at any other time from the said G. to present the said book at the savings bank for the purpose of drawing out money, neither had he the said K. any authority from G. to draw money from the said bank." The indictment was quashed for not sufficiently negating the introductory averments. *Reg. v. Kelleher. Ir. Cr. Cas. Res. 48.*

*Continuing false pretence.*—By a false wage sheet the prisoner obtained from his master a cheque for the amount stated in the sheet to pay the mens' wages. The cheque was informally drawn and payment refused by the bank. The prisoner returned it to his master, and the master tore it up and gave him another, which the prisoner cashed, and appropriated the difference between what was really due for wages, and what was falsely stated to be due in the wage sheet. Held, that the false pretence was a continuing one, and that the second cheque was obtained thereby equally with the first, and that the prisoner was guilty of obtaining the difference by false pretences. *Reg. v. Greathead. 108.*

*Indictment—Evidence.*—The prisoner was convicted of obtaining a sewing-machine by false pretences. The indictment alleged that the prisoner did falsely pretend that a paper, partly in print and partly in writing, produced by the prisoner to the prosecutor, and purporting to be a bank-note, for the payment to the bearer of 5*l.*, was then a good genuine available order for the payment of 5*l.*, and was then of the value of 5*l.*; by means of which false pretence the prisoner did unlawfully attempt to obtain a sewing-machine. The evidence was that the prisoner bargained for the purchase of the sewing-machine for 35*s.*, and said that a friend had told her to get one, and had

sent her the money to pay for it, and at the same time gave a worthless bank-note for 5*l.* of a bank which had stopped payment many years before. The prisoner knew that the bank had stopped payment and that the note was of no value. Held, that the indictment was sufficient, and that the evidence supported the conviction. *Reg. v. Jarman. 111.*

An indictment charged G. with having obtained 30*l.* from W. on the false pretence that G. wanted the loan of 30*l.* to enable him to take a public-house at M. by means, &c. G. did then, &c., obtain the said sum from W. with intent to defraud. Whereas G. was not then going to take a public-house at M., and whereas G. did not want a loan of 30*l.* to enable him to take the said house. Held, that the indictment was not supported by evidence which amounted to this, viz.: "I am going to take a public-house; if you will let me have 30*l.* I will do so. I shall be able to return the 30*l.* while I carry on business at M." *Reg. v. Woodman. 179.*

*Purchase bona fide of property obtained by false pretences.*—The plaintiff *bona fide*, in open market, bought sheep at a fair price from a person who had recently purchased them of defendant by means of a fictitious cheque. The defendant prosecuted that person for obtaining the sheep by false pretences, and he was convicted. The defendant then, with the aid of a policeman, removed the sheep from the plaintiff's to his own farm. Held, that the property in the sheep passed to the plaintiff, and that the plaintiff was entitled to recover them from the defendant, the provision for restitution, under 24 & 25 Vict. c. 96, s. 100, not applying. *Moyce v. Newington. 182.*

*Remoteness of the false pretence.*—The prisoner was charged with obtaining a prize in a swimming race by false pretences. He obtained his competitor's ticket for the race by representing himself to be a member of a club, and by a letter purporting to be written by the secretary of the club. On these representations, which were false, he was allowed twenty seconds start in the race and won the prize. Held, that the false pretences were too remote and that the indictment could not be sustained. *Reg. v. Larner. 497.*

## FORGERY.

*Cheque—No assets—False pretences.*—In payment for goods the prisoner filled up a banker's cheque and gave to the seller. The prisoner's name was R. M., but he signed the cheque as W. M. The seller took the cheque as that of the prisoner without noticing the alteration in the Christian name. Upon presentation at the bank, where the prisoner had no assets, the cheque was dishonoured on the ground that the signature was not that of any customer of the bank. The prisoner having been convicted on an indictment for forgery, the court quashed the conviction, as this was not a forgery but one of false pretences. *Reg. v. Robert Martin*. 875.

*Inchoate instruments.* — The prosecutor wrote the body of a bill of exchange, but without signing the drawer's name, and sent it to the prisoner, who was to accept it, and procure an indorsement by a solvent person, and return it to the prosecutor. The prisoner accepted it, and forged the indorsement of another person's name, and returned it. Held, that the prisoner could not be convicted of forging and uttering, as the document was only an inchoate instrument of no value when the prisoner forged the indorsement. *Reg. v. Harper*. 574.

## FRAUD.

(See FALSE PRETENCES.)

*Purchase not in market overt.*—A purchaser who has not bought in market overt takes the chattel subject to any infirmity of title in the vendor, although he purchases *bonâ fide* without notice. A person named Blenkarn wrote to the respondents and ordered goods, intentionally signing his name so as to be mistaken for another person named Blenkiron, and the respondents, believing they were dealing with Blenkiron, forwarded the goods to Blenkarn, who had no means of paying for the goods. The appellants afterwards purchased the goods *bonâ fide* from Blenkarn. Held, that the property in the goods had never passed from the respondents, and that they were entitled to recover the value of them from the appellants. *Cundy v. Lindsay*. 98.

## GAME.

*Trespass in pursuit of game.*—A person

trespassing on the lands of another, having with him greyhounds and beating bushes, where hares were wont to frequent, should not, on evidence of those facts alone, be convicted under the 27 & 28 Vict. c. 67, of trespass in pursuit of game. *Countess of Kingston v. O'Neill*. 466.

## GRIEVOUS BODILY HARM.

*Unlawful wounding.*—Upon an indictment for feloniously shooting with intent to do grievous bodily harm, and doing grievous bodily harm, it is not competent for the jury to convict of unlawfully wounding. *Reg. v. Miller and others*. 356.

## HIGHWAY.

(See PRACTICE.)

## INDICTMENT.

(See EVIDENCE—PLEADING—PRACTICE.)

## INSANITY.

(See DELIRIUM TREMENS.)

*Removal of untried prisoner to England on the ground of insanity.*—M., a European, having caused the death of a person in India, was visited in his bungalow by the district magistrate, who went there with witnesses intending to investigate the charge. In consequence of M.'s state of mind, and the report of two medical men, the magistrate stayed the proceedings under the Indian Criminal Code, 1872, and M. was removed to Madras under an order of the Madras Government. The High Court of Madras, on an application for the release of M., determined that M. was lawfully in custody, and the Madras Government thereupon, under 14 & 15 Vict. c. 81, s. 1, ordered M.'s removal to England, and on his arrival there the Home Secretary directed him to be confined in B. Criminal Lunatic Asylum, and subsequently removed him to a private lunatic asylum kept by S. to be detained there at the Queen's pleasure. Held, that M.'s detention in S.'s asylum was lawful. *Re Malby*. 609.

## JURY.

*Challenges.*—On a criminal information for conspiracy, where the trial takes place before a special jury, struck under the old system, the traverser is entitled to six

challenges from the reduced panel. *Reg. v. Parnell.* 505.

### LARCENY.

*Evidence of previous larcenies within six months*—*Subject of another indictment*—33 & 34 Vict. c. 112, s. 19.—Upon the trial of an indictment for larceny and receiving certain stolen goods, evidence may be given under 34 & 35 Vict. c. 112, s. 19, that there was found in the possession of the prisoner other property stolen within the preceding period of six months, although such other property is the subject of another indictment against him to be subsequently tried at the same assizes. *Reg. v. Jones and Hayes.* Lopes, J. 3.

*Asportavit.*—The prisoner was employed to trap wild rabbits, and it was his duty to take them, when trapped, to the head-keeper. Contrary to his duty, he trapped rabbits from time to time and took them to another part of the land and placed them in a bag with the intention of appropriating them to his own use, which another keeper observing went and took some of the rabbits out of the bag during the prisoner's absence, and nicked them and put them into the bag again. His reason for nicking them was that he might know them again. The prisoner afterwards took away the bag and the rabbits. Held, that the act of the keeper in nicking the rabbits was no reduction of them into the possession of the master so as to make the prisoner guilty of stealing them. *Reg. v. Petch.* 116.

*Evidence of possession.*—A bag was left by the owner on a Saturday night near to a place where the prisoner and two other persons were at the time. The prisoner passed by the place on his way home, and shortly afterwards one of the two other persons followed in the same direction. That person and the prosecutor then met the prisoner coming back to his home from the opposite direction, and being questioned he denied all knowledge of the bag, and said he had been in the neighbouring wood for firewood. The wood, the prisoner's cottage, and some disused farm buildings near it were then searched without success. On the Monday morning the bag was found in the hayloft in one of the disused farm buildings near to the highway. There was no door to it, and passers-by had easy access to it. The prisoner was then taken into custody for stealing the bag, and said to the constable,

after previously denying that he had taken the bag, "I suppose I shall get a month for this," and made use of some other words of no more definite meaning. The chairman left all the facts to the jury as evidence from which they might infer that the prisoner had had possession of the bag, and directed them, if they found so, to treat the case as one of recent possession. Held, that this direction was wrong, and that the chairman ought to have directed an acquittal. *Reg. v. Thomas Hughes.* 223.

### LARCENY BY ADULTERER.

The prisoner, who was previously on familiar terms with the prosecutor's wife, hired a cart and told the owner to send it to the prosecutor's house to convey furniture for the woman whom he would find there to another address, which he gave to the carter, and where the wife had engaged rooms without her husband's knowledge. The cart was sent as directed and furniture loaded, the wife being present and the husband absent, and the prisoner not being at the loading. The wife accompanied the cart to the lodgings. The prisoner did not appear at the lodgings until the next night, which he passed with her there, and then lived there in adultery with the wife for some days, using the furniture. The jury having convicted the prisoner of stealing the furniture, the conviction was affirmed on case reserved. *Reg. v. Flatman.* 396.

### LARCENY BY BAILEE.

The prosecutor advanced money to the prisoner, a solicitor's clerk, upon deposit of a deed conveying the equity of redemption to the prisoner in a house of his own, and subsequently obtained a legal mortgage from him as security for the sums advanced. The prisoner then obtained from the prosecutor the deed conveying the equity of redemption on the representation that he had found a person who would take a transfer of the mortgage. The prisoner then obtained 140*l.* from another person on the deposit of the deed with him, without notice of the prosecutor's mortgage, and appropriated the money to his own use. The judge at the trial directed the jury that the prisoner was a bailee of the deed, and the jury found that he had fraudulently converted it to his own use. Held, that the prisoner was properly convicted of larceny as a bailee. *Reg. v. Tonkinson.* 608.

## LIBEL AND SLANDER.

*Privilege—Honest belief in truth of defamatory statement—Immateriality of reasonableness of belief.*—Defamatory statements published on a privileged occasion in the honest belief that they are true are privileged, whether such belief is reasonable or not. In an action of libel and slander, the judge ruled that the occasions of publication were privileged, and left it to the jury whether the defendant honestly and reasonably believed his statements to be true. The jury found for the plaintiff. Held, by the Court of Appeal (reversing the judgment of the Queen's Bench Division), that this was a misdirection, and that there must be a new trial, because it had not been explained to the jury that the burden of proof was on the plaintiff, and because the reasonableness of the defendant's belief was immaterial. *Clark v. Molyneux.* 10.

*Calling a man a convicted felon—Justification.*—It is no justification for a libel which calls an editor "a felon editor" to show that he had been convicted of felony and sentenced to imprisonment on a certain charge. His actual guilt, in fact, must be shown, and also, since 9 Geo. 4, c. 32 (per Brett and Cotton, L.JJ.), that he has not undergone the punishment awarded him. The same holds of a libel that calls a man "a convicted felon," if the jury should find that the libel meant anything more than merely that he had been convicted on a charge of felony at some past time. Per Brett and Cotton, L.JJ.: The 9 Geo. 4, c. 32, was passed, among other reasons, in order to restore convicts affected by it, after they had suffered the punishment awarded them, to their full civil rights. *Leyman v. Latimer.* 51.

*Privilege—Report of judicial proceedings.*—An *ex parte* application was made to a police magistrate in open court by certain persons who had been employed by the plaintiff upon a railway for a summons against the plaintiff under the Master and Servants' Act, 1867 (30 & 31 Vict. c. 141) on the allegation that he had not paid them their wages, though he had received funds to enable him to do so. The magistrate refused to grant their application, on the ground that the facts as stated by them did not bring the case within the jurisdiction to do so and afforded no ground for criminal proceedings. The defendants,

newspaper proprietors, published a fair report of the proceedings before the magistrate, but it contained matter defamatory of the plaintiff. Held, that the defendants were protected by the privilege which attaches to all fair and impartial reports of judicial proceedings, and that such privilege was not taken away either by the fact that the magistrate decided that he had no jurisdiction, or that the application was made *ex parte*. *Usill v. Hales and others.* 61.

*Liability of newspaper proprietor.*—Upon a criminal information for libel it was proved that the three defendants, proprietors of the newspaper in which the libel appeared, took an active part in the management of the paper, but had given a general authority to a competent editor to publish whatever he thought proper in the literary part of it, which contained the libel. At the time of the publication of the libel one of the defendants was absent from home on account of illness, and that neither of them had given any authority for, or consent to, or had any knowledge of, the publication of the libel. The jury found that the defendants had not brought themselves within the protection of 6 & 7 Vict. c. 96, s. 7, and convicted them all. Held by Cockburn, C.J., and Lush, J. (Mellor, J., *dissentiente*), that the direction at the trial was defective in not explaining that a general authority to an editor to conduct the business of a newspaper, in the absence of any thing to give it a different character, must be taken to mean an authority to conduct it according to law; and that the verdict—at least as to the absent defendant—being inconsistent with that principle there must be a new trial. *Reg. v. Holbrook.* 185.

*Discovery.*—In a civil action for libel, when a criminal prosecution is pending, the plaintiff has a right under 6 & 7 Will. 4, c. 76, s. 19, and 40 & 41 Vict. c. 57, s. 27, sub-sect. 7, to obtain discovery from the proprietor of a newspaper to be enforced by interrogatories. *Lefroy v. Burnside.* 260.

*Privileged communication.*—Where a defendant wrote to the plaintiff's solicitor in an action of slander in reply to a demand for an apology contained in a letter from the plaintiff's solicitor, and informed the plaintiff's solicitor of the alleged dishonourable conduct of the plaintiff which caused the defendant to speak the words,



and warned the solicitor to look after his costs, as a person guilty of such dishonourable conduct as the plaintiff had been to the defendant could not be trusted: Held, that the communication was privileged, and that the warning was a deduction from the subject matter of the privileged communication, and that it was for the jury, and not the court, to say whether this deduction was an excess of privilege. *Jacob v. Lawrence.* 321.

*Justification.*—Upon the hearing of a criminal information for libel under sect. 5 of 6 & 7 Vict. c. 96, a magistrate upon the preliminary inquiry has no jurisdiction to hear evidence relating to the truth of the libel, or to any other justification. If publication of the libel is proved he is bound to convict. A. was summoned before a magistrate for having unlawfully and maliciously published a defamatory libel of, and concerning B., and A. proposed to prove the truth of all the averments contained in the libel. Held, that the magistrate had no jurisdiction to determine whether the libel was true or not. *Reg. v. Carden.* 359.

On the trial of an indictment for a libel, the libel being that the prosecutor was one of a gang of card sharppers—*innuendo* that he cheated at cards—and the plea stating specific instances of card sharpening, or cheating at cards, and also that he confederated with others for the purpose of playing and cheating at cards, and did so play and cheat at various places: Held, sufficient to prove the plea in substance, and that it was so proved, the jury finding that in two instances the plaintiff did cheat at cards, and that he did confederate with the other persons for the purpose of playing as alleged, and that it was not necessary to prove other instances alleged. *Reg. v. Labouchere.* 419.

### LUNATIC.

*Ill-treatment of lunatic.*—The two prisoners, brothers of a lunatic, took a house, and their mother and a lunatic sister lived with them. They supported the household, but received no payment for or on account of any special charge of their lunatic sister. The ill-treatment of her was proved. Held, that the two prisoners were persons having the care or charge, or concerned or taking part in the custody, care, or treatment of a lunatic within 16 & 17 Vict. c. 96, s. 9. *Reg. v. F. and T. Smith.* 398.

*Unlicensed Asylum.*—Defendant was indicted under 8 & 9 Vict. c. 100, s. 44, for receiving two or more lunatics in a house not duly licensed or registered. Defendant advertised for patients suffering from “hysteria, nervousness and perverseness,” and honestly believed, and on reasonable grounds, that no one of her patients was a lunatic. There was conflicting evidence as to whether any of the patients were lunatics or not. The judge directed the jury that the word “lunatic,” as defined by the Act would include a person whose mind was so affected by disease that it was necessary for his own good to put him under restraint. The jury convicted the defendant, but found that the defendant honestly and on reasonable grounds believed that no one of her patients was a lunatic. Held, that the direction of the learned judge was correct, and that the defendant’s belief was immaterial. *Reg. v. Bishop.* 404.

### MALICIOUS PROSECUTION.

*Authority of a bank manager to arrest on a criminal charge.*—An authority in an agent to arrest offenders, and to institute criminal proceedings, can only be implied where the duties which he has to perform cannot be efficiently discharged for the benefit of his employer unless he has power promptly to apprehend offenders on the spot. W., the acting manager of the appellants (bankers) commenced criminal proceedings against the respondent, a merchant at Sydney, on a charge of stealing a bill of exchange, which proved to be groundless. In an action for malicious prosecution by the respondent against the bank, Held, that such proceedings not being in the ordinary course of banking business, and the evidence not showing any case of emergency, the judge (below) misdirected the jury in telling them that such authority was to be inferred from W.’s position alone; and that in the absence of direct evidence of such authority the bank was not liable. *The Bank of New South Wales v. Owston.* 267.

### MALICIOUS INJURY TO PERSON.

(See OFFENCES AGAINST THE PERSON.)

*Causing panic in a theatre.*—The prisoner was the first, or almost the first, to leave the gallery of a theatre at the close of the performance. He ran down the stairs, wilfully put out the gas, and placed an iron bar across the doorway. This

caused a panic among the persons leaving the gallery, and several of them were seriously injured through the pressure of the crowd. Held, that the prisoner was properly convicted of unlawfully and maliciously doing and inflicting grievous bodily harm within the 24 & 25 Vict. c. 100, s. 17. *Reg. v. Edwin Martin*. 623.

### MALICIOUS DAMAGE TO PROPERTY.

*Obstruction of air way in mine*—The provisions of 24 & 25 Vict. c. 97, ss. 28, 29, which enact "that whosoever shall unlawfully and maliciously" do certain acts therein specified "with intent" to damage or obstruct a mine, or the working or apparatus of a mine, shall be guilty of felony, do not render a person criminally liable for acts causing such damage, but done in *bonâ fide* exercise of a supposed right, and without a wicked mind. *Reg. v. Matthews and Twigg*. Brett, L.J. 5.

Where persons were summoned to petty sessions for maliciously injuring a dwelling-house, and the magistrates, deeming the injury trifling, proceeded to deal with the case in a summary manner, although no regular complainant appeared on the summons, and it was not proved that the injury was less than 5*l.*: Held, that the defendants not having raised the objection to the magistrates' want of jurisdiction in the court below, the conviction was good, and should not be reversed. *Reg. v. Justices of Galway*. 386.

*Injuring a building by dynamite, and endangering life*.—On an indictment under sect. 9 of 24 & 25 Vict. c. 97, for maliciously damaging a building by the explosion of dynamite, whereby the lives of certain persons were endangered. Held, that the endangering of life to be within the section must result from the damage done to the building mentioned in the indictment, but that the enactment does not contemplate the necessity of the persons endangered being inside the building, and would include the case of persons outside whose lives were imperilled by anything proceeding from the damaged building. Held, also, that for the purpose of proving such endangering of life, evidence of damage to other buildings that might be inhabited was not admissible, though such evidence would be admissible for the purpose of showing

the nature and character of the explosion, the extent of the damage, and its tendency to injure or destroy the building. To endanger within sect. 9 includes not only actual injury received, but also exposure to risk of injury, but it is for the jury to say whether the lives of persons were imperilled or not. *Reg. v. McGrath*. 598.

### MANSLAUGHTER.

*Self defence—Fight*.—The right of self defence does not justify counter blows struck with a desire to fight. *Reg. v. Knock*. Lindley, J. 1. *Ibid.* *Reg. v. Bond*. Lindley, J. 2.

*Unlawful act*.—If, while engaged in a friendly game, one of the players commits an unlawful act whereby death is caused to another he is guilty of manslaughter. In such a case it is immaterial to consider whether the act which caused the death was in accordance with the rules and practice of the game. The act would be unlawful if the person committing it intended to produce serious injury to another, or if committing an act which he knows may produce serious injury he is indifferent and reckless as to the consequences. *Reg. v. Bradshaw*. 83.

*Wrongful arrest*.—A warrant was out against the prisoner for his apprehension on a charge of threatening to shoot P. A policeman met prisoner in the street who had something buttoned up in his coat, and demanded to know what he had in his coat. Angry words ensued, and prisoner drew out a revolver and shot the policeman dead. Held, that the policeman not having the warrant was not justified in arresting the prisoner, and that the prisoner's offence was not murder, but manslaughter. *Reg. v. Hugh Carey*. 214.

*Power of jury*.—On an indictment for murder the power of a jury to return a verdict for manslaughter for criminal negligence depends upon the circumstances of the particular case. *Reg. v. French*. 328.

*Use of fire-arms in defence*.—The use of a gun even against an unarmed man may be excused or justified not only by necessity for defence against death or serious injury but the reasonable apprehension of it; but in the absence of necessity, if death is thereby caused, it is manslaughter. *Reg. v. Weston*. 846.



*Rifle practice near highway or private garden.*

—Three persons went out together for rifle practice. They selected a field near to a house, and put up a target in a tree at a distance of about 100 yards. Four or five shots were fired, and by one of them a boy who was in a tree in a garden at a distance of 393 yards was killed. It was not clear which person fired the shot that killed the boy. Held, that all three were guilty of manslaughter. *Reg. v. Salmon.* 494.

*Right of next of kin to appear in proceedings*

—*Riot—Homicide.*—In a case of homicide the next of kin of the deceased have no legal right to be heard, but *ex gratiâ* the court may hear them. If parties assemble to obstruct the officers of the law all persons so assembling are guilty of an unlawful assembly whether a riot takes place or not, and if a homicide takes place in consequence of that unlawful assembly, every one taking a part in the unlawful assembly may be personally responsible for the homicide. *Reg. v. McNaughten.* 576.

### MONEY PAID UNDER FALSE PRETENCES.

*Evidence of similar frauds in other cases.*—

In an action for the return of money paid by the plaintiff to the defendant through the fraud of the defendant's agent, evidence that by the same false pretences as in the particular case, the defendants' agent had induced other persons to pay money to the defendants, is admissible to prove either the agency, or the fraud, and the defendant's knowledge of it. *Blake v. The Albion Life Assurance Society.* 246.

### MUNICIPAL CORPORATION.

*Justice of the peace.*—The mayor of a borough named in schedule B. of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), which has no separate commission of the peace, has jurisdiction under sects. 57 and 101 to act as a justice of the peace for the borough. *Wilson v. Strugnell.* 624.

### MURDER.

(See PRACTICE—EVIDENCE.)

*Evidence of threats on other occasions.*—On an indictment for murder, death having been caused by shot from a gun in the hands of

the prisoner, evidence of former threats by deceased of deadly violence with similar threats and circumstances on the occasion in question received as evidence of danger to life or serious violence or reasonable apprehension of it, such as might excuse or justify recourse to a loaded firearm in self-defence. *Reg. v. Weston.* 346.

*Inciting to murder.*—Defendant wrote and published an article in a newspaper in London, which was sold to the public and also circulated among subscribers, which article the jury found was intended to and did encourage, and was an endeavour to persuade persons to murder foreign potentates; and that such encouragement and endeavour to persuade was the natural and reasonable effect of the article: Held, that the defendant was guilty of a misdemeanour under sect. 4 of 24 & 25 Vict. c. 100. *Reg. v. Most.* 583.

### OBSCENE PUBLICATIONS.

*Criminal information—Death of informer—*

*Abatement.*—When a proceeding in the nature of a criminal information is set on foot by a sufficient information before a magistrate, and he issues a summons, the death of the informer does not abate the proceeding. G. laid an information against T. that he had on his premises obscene books, &c., fit to be destroyed: A summons was issued by the magistrate to T. to show cause why the books should not be destroyed. Three days after the return of the summons, but several months before the case was heard, G. died. At the hearing no objection was taken by T. that G. had died, and an order was made for the destruction of the books. Held, that the order was good, and that death of G. did not abate the proceedings. *Reg. v. Truelove.* 408.

*Pleading.*—An indictment for publishing an obscene book which does not set out the passage or passages alleged to constitute the offence, but only refers to the book by its title, is bad, and the defect is not cured by verdict. *Reg. v. Bradlaugh.* 68.

### OFFENCES AGAINST THE PERSON ACT.

(See MALICIOUS INJURY TO PERSON.)

“Explosive substance” under 24 & 25 Vict.

c. 100, ss. 28, 29—*Electric fuse detonator or torpedo cap containing fulminate mercury, gun cotton, and meal powder*—Questions for the jury. *Reg. v. Saunders.* 180.

*Noxious thing*—*Excessive quantity of oil of juniper*.—On an indictment under 24 & 25 Vict. c. 100, s. 58, for causing to be administered to a woman "a noxious thing" described in one count as an excessive dose of oil of juniper, which was the drug administered (first in a small and then in a large quantity) with intent to cause miscarriage—it not having *per se* any direct tendency to produce miscarriage, but, even in a small quantity, producing vomiting, and so having an indirect tendency, if taken in excess, to cause miscarriage by reason of violent vomiting or purging. Held, that if there was an administration of such an excessive dose by the prisoner with the intent alleged, it would be "a noxious thing" within the Act; and *semble*, that as the statute does not require that the drug should have any tendency to produce miscarriage, it is enough if it is "noxious," and is given with the intent charged if it is in itself hurtful, there being no other evidence but the woman's that the prisoner incited her to take the excessive doses, except that her father accused him of giving his daughter such things "to produce abortion," and that he did not deny it. *Reg. v. Cramp.* 390.

Supplying a noxious thing to a person with intent that it shall be used by a certain woman to produce abortion is a misdemeanour within 24 & 25 Vict. c. 100, s. 59, although the woman for whom it was intended was not pregnant. *Reg. v. Titley.* 502.

### PLEADING.

(See AMENDMENT—DEBTORS ACT, 1869—FALSE PRETENCES—LIBEL—OBSCENE PUBLICATIONS—PRACTICE.)

### PERJURY.

*Evidence—Practice*.—When perjury is alleged as having been committed before justices at petty sessions on the hearing of a charge contained in a written information, that information must be produced, or its loss or destruction proved, before secondary evidence of its contents can be given on the trial of an indictment for perjury. *Reg. v. Dillon.* Lopes, J. 4.

*Evidence of appointment of judge before whom perjury took place*.—An indictment for perjury alleged the offence to have been committed before U., then sitting as the duly qualified and appointed deputy judge of the County Court of W. Proof was given that the perjury took place in the presence of U. at the county court, and a certified minute of the proceedings, under the seal of the court, was put in evidence, intituled, "Minute of judgments, orders, and proceedings at a court holden at, &c., before U., deputy judge of the said court." Held, that there was sufficient proof of U. acting as deputy judge, and *prima facie* evidence of his appointment as such. And, per Lord Coleridge, C.J., "the minute of the proceedings, by 9 & 10 Vict. c. 95, s. 111, was evidence of the regularity of his appointment." *Reg. v. Morris Roberts.* 101.

*Evidence in contradiction*.—On a charge of perjury against a female, for swearing falsely that she had not had connection with a man, *semble*, that the evidence of more than one man to prove connection with the woman was admissible. *Reg. v. Adams.* 215.

*Jurisdiction in the case in which perjury committed*.—H., a police constable obtained an illegal warrant against S. for assaulting him and obstructing him in the discharge of his duty. H. arrested S. thereon, and took him before the magistrates in petty sessions, who convicted and sentenced S. to six months' imprisonment, with hard labour. No objection was taken by S. to the proceedings, and he called a witness to show that he was not guilty. H. was afterwards indicted for perjury on the hearing of the case in petty sessions, and convicted by the jury. Subject to the opinion of the court as to the jurisdiction of the justices in petty sessions, because there was no written information nor oath to support the warrant, Held (Kelly, C.B. dissenting), that the justices had jurisdiction to hear and determine the case against S., notwithstanding that he was brought before them on an illegal warrant, and there was no written information. *Reg. v. Owen Hughes.* 284.

### POACHING.

*Night poaching—Offensive weapons—Intent*.—Three men in company were seen hunting game in the night-time, with dogs. It was not proved that two of the men were

in any way armed. The third, who was lame, only carried his usual walking-stick. The jury were directed not to find the third man guilty, unless satisfied that the stick was an offensive weapon, and that the prisoner had carried it with the intention of using it as an offensive weapon should occasion arise. *Reg. v. P. Williams. Mellor, J.* 59.

### PRACTICE.

*Statement of prisoner when defended by counsel.*—Prisoner's counsel allowed to make a statement on the part of a prisoner to show that the trigger of the gun was pulled without the intention of firing it (the indictment being for murder). *Reg. v. Weston.* 346.

*Winter Assize Act—Adjoining counties.*—Under the Winter Assize Act, 1876 (40 & 41 Vict. c. 57) it is not necessary that the Winter Assize county should be contiguous to the county in which the alleged crime was committed. The fact of a view of the *locus in quo* being necessary for the fair trial of a prisoner is not sufficient ground for removing the indictment into the Q. B. division by *certiorari* when the *locus in quo* is in a different county from the Winter Assize county (*dissentiente O'Brien, J.*) Semble, that the judge at the trial should postpone the case to enable the trial to take place in the county where a view could conveniently be had. *Reg. v. P. McNamara.* 229.

*Trial of persons on bail at the Winter Assize.*—The Orders in Council of Aug. 1879, made under the Winter Assize Acts, 1876 and 1877, declare which counties are to be united for holding a Winter Assize, and in each case enacts: "Nothing in this order shall authorise the trial or require the attendance at the said Winter Assizes for the said Winter Assize county of any prisoner who shall have been admitted to bail, and who shall not, at the time of the holding of such Winter Assize for the said winter assize county, be in custody." Held, that a prisoner, who had been admitted to bail, and who surrendered after the opening of the commission, was not in custody at the time of the holding of the assizes, and could not therefore be tried. He should have surrendered before the opening of the commission. *Reg. v. Stafford.* 353.

*Joinder of counts—Consecutive sentences.*—

Counts for different misdemeanours on which the judgment is of the same nature may be joined in the same indictment, and, on such counts, judgment may, and, indeed, ought to be separately entered; and on any such counts there may be consecutive sentences of imprisonment or penal servitude, even though each be the maximum sentence for a single offence. Several counts upon assignments of perjury on oaths taken on different occasions in different proceedings relating to the same subject-matter may be laid in one indictment. *Castro v. The Queen.* 436, 546.

*Contra pacem.*—Since the 14 & 15 Vict. c. 100, s. 24, an indictment for a statutory offence, which is also a common law offence, need not conclude "*contra formam, &c.*," in order to enable the court to impose the statutory penalty. *Castro v. The Queen.* 546.

### PRIZE FIGHT.

(See MANSLAUGHTER—UNLAWFUL ASSEMBLY.)

### PRACTICE.

*Postponement of presentment of bill to grand jury.*—Upon a charge of murder by poison the presentment of a bill to the grand jury cannot be postponed to the next assizes on the ground that other and like charges may before that time be brought against the prisoner; and if no bill is so presented the prisoner is entitled to be discharged. *Reg. v. Heeson. Lush, J.* 40.

*Change of venue.*—In a case of murder the venue was changed from the county where the alleged crime was committed on an affidavit by prisoner's solicitor that from conversations he had had with jurors he was convinced a strong prejudice existed against the prisoner, and that an impartial trial could not be had in that county. *Reg. v. McEncany.* 87.

*Insane prisoner.*—In the case of a prisoner's inability to plead on the ground of insanity, it is unnecessary to show that at other times the prisoner had been insane, the real question being whether the prisoner was of sufficient understanding at the time of arraignment. *Reg. v. Keary.* 143.

*Election as to charges in indictment.*—Where an indictment contains two counts, the first charging the accused as principal in a felony, the second as accessory after the fact to the same felony, the prosecutor must elect on which count he will proceed. *Reg. v. Brannon and others.* 394.

*Amendment when no committal by a magistrate.*—Where an indictment has been preferred and found by the grand jury, and there has been no preliminary inquiry before a magistrate, the court will not go out of its way to amend the indictment after objection taken by the prisoner's counsel. *Reg. v. O'Callaghan.* 499.

*New trial on indictment for obstructing a highway.*—Upon the trial of an indictment for obstructing a highway, removed into the Queen's Bench Division, the jury came to a special finding upon which a verdict of "Not Guilty" was recorded. A rule nisi was obtained for a new trial, but the court held that it had no jurisdiction to make it absolute, the defendant having been in peril of imprisonment. *Reg. v. Duncan.* 571.

## RAPE.

*Child between ages of twelve and thirteen.*—88 & 89 Vict. c. 94, s. 4.—An indictment for the felony of rape still lies against one who ravishes a female between the age of twelve and thirteen, notwithstanding the 88 & 89 Vict. c. 94, s. 4, which enacts that whosoever shall unlawfully and carnally know and abuse any girl above the age of twelve and under the age of thirteen years, whether with or without her consent, shall be guilty of a misdemeanour. *Reg. v. Dickin.* Mellor, J. 8.

*Admissibility of a complaint made to third person in the absence of accused.*—Where a man is charged with committing a rape upon a female, the particulars of a complaint she made against him to other persons in his absence about an hour and a half after the alleged offence may be given in evidence. *Reg. v. Wood.* Bramwell, L.J. 46.

*On married woman when asleep.*—While a married woman was in bed with her husband the prisoner got into the bed and proceeded to have connection with her, she being at the time asleep. She awoke, and at first thought he was her husband, but upon hearing him speak, and seeing

her husband at her side, she flung the prisoner off, and called out to her husband, when the prisoner ran away. Held, that the prisoner was guilty of rape. *Reg. v. Young.* 114.

## RECEIVING STOLEN GOODS.

(See LARCENY.)

*Evidence of receipts of other stolen property.*—In order to show guilty knowledge under 34 & 35 Vict. c. 112, s. 19, it is not sufficient merely to prove that other property stolen within the preceding twelve months had at some time previously been dealt with by the prisoner. It must be proved that such other property was found in the possession of the prisoner at the time when he is found in possession of the property, the subject of the indictment. To show guilty knowledge in the receiver of stolen goods, evidence was tendered that a short time previously the prisoner had sold for half its value and had otherwise disposed of other property stolen within the preceding twelve months. Held, that the evidence was inadmissible. *Reg. v. Drage and others.* 85.

*Property handed to thief by employer for detection of the receiver.*—A lad was detained on leaving his master's premises, and a policeman sent for who searched him and took from him in his master's presence a stolen cigar, the property of his master. In consequence of the lad's statement, the cigar was returned to him with five others which the lad took to the prisoner and gave to him. Held, that the prisoner could not be convicted of feloniously receiving the cigars knowing them to be stolen, for that they were not stolen property at the time they were received, the master and policeman having acted in concert in supplying the lad with the six cigars and instructing him what to do with them. *Reg. v. Hancock.* 119.

## RESTITUTION OF STOLEN PROPERTY.

The Postmaster General is not entitled to have restored to him moneys found on the prisoner part of the proceeds of the theft, the prisoner having pleaded guilty to an indictment for stealing a letter containing two bank notes the property of the Postmaster-General. *Reg. v. Jones.* 528.

## REWARDS FOR APPREHENSION OF OFFENDERS.

A reward was offered to any person giving such information to the superintendent of police at D— as should lead to the apprehension of G. G. gave himself up to the chief constable at E—, who after searching the *Police Gazette* and satisfying himself as to G.'s identity, telegraphed to the superintendent at D— and upon obtaining a reply apprehended and charged G. who was ultimately convicted. Held that the chief constable at E— was not entitled to the reward, G. having himself given the information leading to his apprehension. *Bent v. Wakefield and Barnsley Union Bank.* 208.

## TIME.

Computation of term of imprisonment.

(See FALSE IMPRISONMENT.)

## UNLAWFUL ASSEMBLY.

Divers persons assembled in a room, entrance money being paid to witness a fight between two persons. The combatants fought with gloves on, each being attended by a second, who acted in the same way as a second at prize fights. The combatants fought for about forty minutes, with great ferocity, and severely punished each other. The police interfered, and arrested the defendants, who were among the spectators. Upon an indictment against them for unlawfully assembling together for the purpose of a prize fight, the chairman told the jury that, if it was a mere exhibition of skill in sparring, it was not illegal; but, if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize fight,

whether the combatants fought in gloves or not, and left it to the jury to say whether it was a prize fight or not. Held, that the jury were properly directed. *Reg. v. Orton and others.* 226.

## VENUE.

(See EMBEZZLEMENT—PRACTICE.)

*Jurisdiction over the offence.*—It was the duty of the prisoner, a commercial traveller, to remit daily to his employers in L. the moneys he collected without reduction. The prisoner on the 1st and 2nd March, 1878, collected at N. two sums of money which he did not remit or account for till the first week in April when one of his employers went to G., saw the prisoner, and taxed him with receiving moneys and not accounting for them. The prisoner then and there handed to his employer a list of moneys he had collected and not accounted for, including the above two sums. There was no evidence that the prisoner returned from N. to G. on either of the days, or at what times of the days he received the two sums of money. He was indicted and convicted at G. for embezzling the two sums of money. Held, that the conviction was bad as there was no evidence of embezzlement within G. *Reg. v. Treadgold.* 220.

*Change of venue.*—An indictment for murder twice ready for hearing, but postponed on the ground that an impartial trial could not be had, was removed to another venue where it appeared probable that a fair trial might be had, but the Crown was put under terms to expedite the hearing and to pay the costs of the accused incurred by the change of venue. *Reg. v. Phelan.* 579.







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